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FIRST DEAN OF THE SCHOOL

By his Wife and Daughter

A. M. BOARDMAN and ELLEN D. WILLIAMS

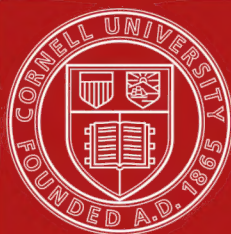
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CROWN CASES

RESERVED FOR CONSIDERATION,

AND

DECIDED BY THE JUDGES OF ENGLAND,

WITH

A SELECTION OF CASES AND NOTES OF CASES

RELATING TO INDICTABLE OFFENCES,

ARGUED AND DETERMINED IN THE

COURT OF QUEEN'S BENCH

AND

The Courts of Error.

BY

HENRY RICHARD DEARSLY, OF THE MIDDLE TEMPLE,

AND

THOMAS BELL, OF THE INNER TEMPLE,

ESQUIRES, BARRISTERS-AT-LAW.

VOL. I.

FROM 3RD MAY, 1856, TO 1ST MAY, 1858, INCLUSIVE.

L O N D O N :

STEVENS & NORTON; H. SWEET, AND W. MAXWELL,
LAW BOOKSELLERS & PUBLISHERS.

1858.

M7144

LONDON :
RAYNER AND HODGES, PRINTERS,
109, FETTER LANE, E.C.

PREFACE.

IN presenting this Volume of the Crown Cases Reserved to the Profession, we have gratefully to acknowledge the kindness and courtesy of all the learned Judges with whom we have had occasion to communicate respecting any of the Cases herein Reported. To Lord CAMPBELL we feel peculiarly indebted for the valuable assistance which we have constantly received from his Lordship, and for the kind manner in which that assistance has always been afforded.

H. R. DEARSLY.

THOMAS BELL.

TEMPLE,
June 1858.

A TABLE OF THE NAMES OF CASES

REPORTED IN THIS VOLUME.

	Page
Mansell v. Regina. (<i>See Regina v. Mansell</i>) .	375
Regina v. Autey. (<i>Forgery. Uttering. Warrant or Order for payment of Money. Indorsement on Railway Dividend Warrant</i>) . . .	294
———— Bayley. (<i>Embezzlement. Servant of several Railway Companies using one Station. Servant of Committee appointed by such Companies</i>) .	121
———— Briggs. (<i>Bigamy. 9 Geo. 4. c. 31. s. 22. Seven years' Absence. Evidence of Knowledge. Means of Knowledge. Onus of Proof</i>) .	98
———— Bryan. (<i>False Pretences. Misrepresentation of Quality. Puffing Goods, 7 & 8 Geo. 4. c. 29. s. 53.</i>)	265
———— Burgon. (<i>False Pretences. Obtaining Money by a Contract induced by False Representations. Pretending House built on Land proposed to be Mortgaged</i>)	11
———— Castle. (<i>Felony. County Court. Delivery Paper purporting to be a Copy of Process of the Court. 9 & 10 Vict. c. 95. ss. 57. 85.</i>) .	363
———— Closs. (<i>Forgery. Painting artist's name on picture to pass it off as original. Cheat at Common Law</i>)	460
———— Cockburn. (<i>Evidence. Absence of Witness through Illness. Admissibility of Depositions. 11 & 12 Vict. c. 42. s. 17.</i>)	203

	Page
Regina v. Cross and Leyland. (<i>Evidence. Bankrupt. Compulsory Examination. Questions tending to Criminate. 12 & 13 Vict. c. 106. s. 117.</i>)	68
——— Cryer. (<i>Venue. Receiving Stolen Goods. Transmission of Stolen Note by Post. 7 & 8 Geo. 4. c. 29. s. 56.</i>)	324
——— Danger. (<i>False Pretences. Valuable Security. Fraudulently inducing person to accept a Bill of Exchange. 7 & 8 Geo. 4. c. 29. s. 53.</i>)	307
——— Dring and Wife. (<i>Receiving Stolen Goods. Joint Indictment. Successive receipts of same Goods. Husband "adopting" receipt of Wife. 14 & 15 Vict. c. 100. s. 14.</i>)	329
——— Essex. (<i>Embezzlement. Evidence. Property. in Trustees of Savings Bank. Evidence of acting as Trustee</i>)	369
——— Essex. (<i>Larceny or False Pretences</i>)	371
——— Evans. (<i>Felony. County Court. Acting under pretence of the Process of the Court. 9 & 10 Vict. c. 95. s. 57.</i>)	236
——— Farrow. (<i>Procuring Abortion. Administering and Causing to be taken. Absence of Person charged at the time of Taking. 7 Wm. 4 & 1 Vict. c. 85. s. 6.</i>)	164
——— Feist. (<i>Anatomy Act. 2 & 3 Wm. 4. c. 75. ss. 7. 8. Disposal of Bodies for the purpose of Dissection.</i>)	590
——— Fitch. (<i>Larceny. Adulterer</i>)	187
——— Fitchie. (<i>Forgery. Uttering. Accountable Receipt for Goods. Pawnbroker's Ticket. 11 Geo. 4 & 1 Wm. 4. c. 66. s. 10. 39 & 40 Geo. 3. c. 99. ss. 6. 14.</i>)	175
——— Frampton. (<i>Receiving Goods embezzled. Embezzlement deemed Larceny. 7 & 8 Geo. 3. c. 29. s. 47.</i>)	585
——— Fry. (<i>False Pretences. Loan of Money obtained by Misrepresentation of matter of fact</i>)	449
——— Gardner. (<i>False Pretences. Contract for Board and Lodging. Obtaining too Remote</i>)	40

	Page
<i>Regina v. Gate Fulford. (Repair of Public Road. Award. Power of Commissioners. Assumption in Favour of Award. Practice in Court of Criminal Appeal)</i>	74
———— <i>Gaylor. (Manslaughter. Accessory before the Fact. Administering Drugs with intent to procure Abortion. 11 & 12 Vict. c. 46. s. 1.)</i>	288
———— <i>Godfrey. (False Pretences. Obtaining a Cheque. Allegation of Property)</i>	426
———— <i>Gorbutt. (Larceny as Servant. Embezzlement. 14 & 15 Vict. c. 100. s. 13.)</i>	166
———— <i>Gray. (Attempt to Murder. Causing bodily injury dangerous to Life. Exposing Child. 7 Wm. 4 & 1 Vict. c. 85. s. 2.)</i>	303
———— <i>Green. (Larceny. Bailee. Property wrongly Laid. Autrefois Acquit. Amendment. 14 & 15 Vict. c. 100. ss. 1, 2, 3)</i>	113
———— <i>Griffiths. (Forgery. Receipt. Fraudulent addition of Stamp and insertion thereon of larger sum than paid)</i>	548
———— <i>Hodgson. (Forgery. Public Document. Proof of Intent to Defraud. 14 & 15 Vict. c. 100. s. 8.)</i>	3
———— <i>Hook. (Perjury. Evidence. Admissions by Defendant. Corroborative Evidence)</i>	607
———— <i>David Hughes. (Manslaughter. Death caused by negligent omission of a Duty)</i>	248
———— <i>Richard Hughes. (Perjury. Affiliation Summons. Residence of Applicant: Jurisdiction. 7 & 8 Vict. c. 101. s. 2. 8 & 9 Vict. c. 10. s. 10.)</i>	188
———— <i>Jennings. (Larceny. Indictment. Rejecting Allegation of Larceny as a Servant, and convicting of simple Larceny. Special Property in Agent)</i>	447
———— <i>Jessop. (False Pretences. Pretence that a 1l. Note is a 5l. Note. Prosecutor's means of detecting Fraud)</i>	442
———— <i>Johnson. (Larceny. Evidence. Proof of Intestacy and that property in the Ordinary. Absence of Evidence as to some of the Articles mentioned in Indictment)</i>	340

	Page
Regina v. Jones. (<i>Larceny. Stealing metal fixed in Land. 7 & 8 Geo. 4. c. 29. s. 44.</i>) . . .	555
——— Kay. (<i>Larceny. False Pretences. Bailment. Postmaster General</i>) . . .	231
——— Keighley. (<i>False Pretences. Evidence. Direction to Jury. Case imperfectly Stated</i>) . . .	145
——— Lewis. (<i>Manslaughter. Death in England from injuries inflicted on High Seas. Foreign Subject. Jurisdiction. 9 Geo. 4. c. 31. ss. 7 and 8</i>) . . .	182
——— Lewis. (<i>Costs in Court for Consideration of Crown Cases. Taxing officer. 7 Geo. 4. c. 64. s. 22.</i>) . . .	326
——— Light. (<i>Assault on Constable. Lawful Apprehension. Arrest without a warrant. Continuing Pursuit</i>) . . .	332
——— Lister. (<i>Embezzlement. 7 & 8 Geo. 4. c. 29. s. 47. Evidence. Accounting. Entry to credit of Customer in Ledger</i>) . . .	118
——— Lister and Biggs. (<i>Nuisance. Misdemeanor. Keeping ignitable substances in populous neighbourhood. Danger ab extra. Question for jury</i>)	209
——— Lopez and Sattler. (<i>Offences by Foreigners on board English Vessels on the High Seas. Jurisdiction of English Courts. 18 & 19 Vict. c. 91. s. 21.</i>) . . .	525
——— M'Pherson. (<i>Housebreaking. Attempt to steal in dwelling-house when Goods specified in indictment are not there. 14 & 15 Vict. c. 100. s. 9.</i>) . . .	197
——— Mansell. (<i>Challenge. When Crown must shew cause. Order that Juryman stand by. Order of calling Jurors. Award of Venire. Writ of Error. Practice in Court of Exchequer Chamber. 33 Edw. 1. st. 4. 6 Geo. 4. c. 50. s. 29.</i>) . . .	375
——— Manwaring. (<i>Bigamy. Evidence. Proof of marriage in Dissenters' Chapel. Presumption of Legality. Secondary evidence of Public Documents. 6 & 7 Wm. 4. c. 85. 14 & 15 Vict. c. 99. s. 14.</i>) . . .	132

	Page
Regina v. Mellor. (<i>Mistrial. Juryman on Panel answering to Name of another Juryman also on Panel, and being sworn in such Name. Writ of Error. Jurisdiction of Court for Consideration of Crown Cases Reserved. 11 & 12 Vict. c. 78.</i>)	468
——— Mills. (<i>False pretences. Prosecutor's knowledge of the Falsehood of the Pretence</i>)	205
——— Moah. (<i>Forgery. Testimonial of Character. Letter</i>)	550
——— Moss. (<i>Cheating at Cards. 8 & 9 Vict. c. 109. s. 17. Averment of property in Indictment</i>)	104
——— Poole and Yeates. (<i>Larceny. Animus Furandi. Intention to divest property of owner. Fraudulent removal of Articles in order to obtain Payment as for work done upon them</i>)	345
——— Reaney and another. (<i>Evidence. Dying Declaration</i>)	151
——— Roebuck. (<i>False Pretences. Contract. Attempt to obtain Money. Misrepresentation as to Quality of an Article. Evidence of similar Attempts</i>)	24
——— Sattler. (<i>See Regina v. Lopez and Sattler</i>)	525
——— Scott. (<i>Evidence. Bankrupt. Compulsory Examination. Questions tending to Criminate. 12 & 13 Vict. c. 106. s. 117. Averments in Indictment. 17 & 18 Vict. c. 119. s. 16.</i>)	47
——— Sharpe. (<i>Misdemeanor. Removal of corpse from Burial Ground</i>)	160
——— Sherwood. (<i>False Pretences. False pretence of Quantity. False Pretence of Weight after delivery of Goods</i>)	251
——— Smith and Wife. (<i>Husband and Wife. Wife acting under Coercion. Wounding. Grievous Bodily Harm</i>)	553
——— John Smith. (<i>Forgery. Trade marks. Printed Wrappers for goods. Printed Labels</i>)	566
——— Spencer and Davidson. (<i>Arson. Stack of Grain. Flax Plant. 7 Wm. 4 & 1 Vict. c. 89. s. 10.</i>)	131

	Page
Regina v. Thorpe. (<i>Embezzlement. Money received in the name or on account of the Master</i>) .	562
—— Toole et al. (<i>Evidence. Prosecutor's Christian Name. Proof by person who has seen him sign it</i>)	194
—— Trebilcock. (<i>Larceny. Verdict. Intention permanently to Deprive the Owner of Property. Recommendation to Mercy no part of Verdict. Fraudulent Trustees Act. 20 & 21 Vict. c. 54. s. 4.</i>)	453
—— Walker. (<i>Embezzlement. Servant. Factor. Agent</i>)	600
—— Watson. (<i>False Pretences. Inducing a person to enter into partnership and advance money as Capital. Exaggerated statement of Profits</i>) .	348
—— C. West. (<i>False Pretences. Misrepresentation of an existing Fact combined with a promise for future Conduct</i>)	575
—— F. and E. West. (<i>Larceny of Bank Notes. Notes of Provincial Bank not in Circulation. 14 & 15 Vict. c. 100. s. 18.</i>)	109
—— Harriet Wilson. (<i>Procuring Abortion. 7 Wm. 4 & 1 Vict. c. 85. s. 6. Administering and Causing to be Taken. Absence of Person charged at the time of Taking</i>)	127
—— James Wilson. (<i>Forgery. Certificate of Seaman's Character. Merchant Shipping Act, 1854, s. 176</i>)	558
—— Joseph Wilson. (<i>Larceny. Evidence. Recent Possession. Negating Prisoner's Statement</i>)	157
—— Wright. (<i>Larceny by Clerk. Embezzlement. Determining Possession of Servant. General Deficiency. Necessity for Proving Specific Amount taken</i>)	431
—— Wood. (<i>Night Poaching. Evidence. Permission of Owner or Occupier of Land</i>) . .	1

A TABLE OF STATUTES.

	Page		Page
13 Rich. 2. stat. 2 - -	184	6 & 7 Wm. 4 & 1 Vict.	
33 Edw. 1. stat. 4 - -	375	c. 89. s. 10 - - -	131
27 Hen. 8. c. 4 - -	184	7 & 8 Vict. c. 2 - - -	529
28 Hen. 8. c. 15 -	184, 529	c. 101. s. 2	188
2 Geo. 2. c. 21 - - -	185	s. 31	599
39 & 40 Geo. 3. c. 37 -	529	8 & 9 Vict. c. 10. s. 10	188
c. 99. s. 6	175	c. 109. s. 17	104
s. 14	175	9 & 10 Vict. c. 95. s. 57	
6 Geo. 4. c. 50. s. 29 -	375		236, 363
7 & 8 Geo. 4. c. 29. s. 44	555	11 & 12 Vict. c. 46. s. 1	289
s. 56	326	12 & 13 Vict. c. 106. s. 117	
c. 64. s. 22	326		47, 68
9 Geo. 4. c. 31. ss. 7 & 8	185	14 & 15 Vict. c. 99. s. 14	132
s. 22 -	98	c. 100. s. 1	13
c. 34. s. 8 -	182	s. 8	3
11 Geo. 4 & 1 Wm. 4.		s. 9	197
c. 66. s. 10 - - -	175	s. 13	166
2 & 3 Wm. 4. c. 75. s. 7	590	s. 18	109
4 & 5 Wm. 4. c. 36. s. 22	529	17 & 18 Vict. c. 104.	
6 & 7 Wm. 4 & 1 Vict.		s. 176	558
c. 85. s. 2 - - - -	303	c. 119. s. 16 -	47
6 & 7 Wm. 4 & 1 Vict.		18 & 19 Vict. c. 91. s. 21	525
c. 85. s. 6 - - - -	127	20 & 21 Vict. c. 54. s. 4	453

ERRATA ET ADDENDA.

PAGE

~~47, marginal note, last line, dele "of the section 16."~~

74, marginal note, line 9, after "award" add "a verdict was entered for the Crown, subject to a case, from which the following facts appeared."

~~367, last line but one of marginal note, dele "as" and insert "Sembie."~~

412, note (a). Lord CAMPBELL has however recently stated that, having further considered the matter and conferred with other Judges, his Lordship is now of opinion that no bill of exceptions lies in a Criminal Case, although the offence charged amounts only to a misdemeanor: MS. *Regina v. Brown, et al.* Q. B. *February* 1858.

~~468, marginal note, line 36, for "W. H. T.," read "J. H. T."~~

J. L. M.
27/2/33

REPORTS

OF

CROWN CASES RESERVED.

&c. &c. &c.

REGINA v. JAMES WOOD.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Mr. Baron *Bramwell*, at the *Staffordshire* Spring Assizes, 1856.

James Wood was indicted for being with others, to the number of three, unlawfully on land for the purpose of taking game, being armed.

The case was proved, except that it was shown that the land was the freehold of *Jonas Spode*, but in the occupation of one *Johnson*, a tenant of *Spode*. It was thereupon objected for the prisoner, that to support the indictment it must be shown he was "unlawfully" on the land, and that to show he was unlawfully there, it must be shown by direct evidence that he had not the permission of either the tenant, or the landlord, if the game was reserved to him, and

On an indictment for night poaching it is not necessary, on behalf of the prosecution, to show that no permission to be on the land was given by the landlord or tenant, in order to prove that the prisoners were there unlawfully.

1856.

 WOOD'S
Case.

an authority to that effect was cited (a). The jury found the prisoner guilty, and unless the particular proof suggested was necessary, there was abundant evidence, not merely that the prisoner and those with him were on land which belonged to none of them, but also in their conduct, that they were unlawfully there. In deference to the authority cited, I reserved this question for the Court of Criminal Appeal.

G. BRAMWELL,

29 April, 1856.

This case was considered on 3rd *May*, 1856, by JERVIS C. J., WIGHTMAN J., CRESSWELL J., ERLE J., and BRAMWELL B.

No counsel appeared for the prisoner. *G. C. Mereweather* appeared for the Crown, but was not called upon by the Court.

JERVIS C. J.—If persons are found at night armed and knocking down the keepers, can it be said that it is necessary to call the tenant of the land to prove that they were not there by permission for a day's shooting? The conviction was right.

The other learned Judges concurred.

Conviction affirmed.

(a) An unreported case (*Reg. v. Edge*), said to have been decided by MARTIN B., at the *Staffordshire* Spring Assizes, 1854.

REGINA v. HENRY HODGSON.

1856.

8 Cox 25

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by Mr. Baron BRAMWELL, at the *Staffordshire* Spring Assizes, 1856.

Henry Hodgson was indicted at common law for forging and uttering a diploma of the College of Surgeons. The indictment was in the common form.

The College of Surgeons has no power of conferring any degree or qualification, but before admitting persons to its membership, it examines them as to their surgical knowledge, and if satisfied therewith, admits them, and issues a document, called a diploma, which states the membership. The prisoner had forged one of these diplomas. He procured one actually issued by the College of Surgeons, erased the name of the person mentioned in it, and substituted his own; changed the date, and made other alterations to make it appear to be a document issued by the College to him. He hung it up in his sitting room, and on being asked by two other medical practitioners whether he was qualified, he said he

The prisoner was convicted on an indictment at common law for forging and uttering a diploma of the College of Surgeons. The jury found that the prisoner forged the document with the general intent to induce the belief that it was genuine and that he was a member of the College; and that he showed it to certain persons with intent to induce such belief in them; but that he had no intent in forging or in uttering to commit any

particular fraud or specific wrong to any individual. *Held*, 1. That the conviction was wrong. 2. That although since the statute 14 *Vict.* c. 100. s. 8,* it is sufficient in an indictment for forgery to allege that the act was done with intent to defraud, without alleging the intent to defraud any particular person, it is still essential to a conviction that such an intent should be proved.

Semble, that a diploma of the College of Surgeons is not a public document.

* The section is as follows:—"From and after the coming of this Act into operation it shall be sufficient in any indictment for forging, uttering, offering, disposing of or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud without alleging the intent of the defendant to be to defraud any particular person; and on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person; but it shall be sufficient to prove that the defendant did the act charged with an intent to defraud."

1856. was, and produced this document to prove his assertion.

HODGSON'S
Case.

When a candidate for an appointment as vaccinating officer, he stated he had his qualification, and would show it if the person inquiring (the clerk of the guardians, who were to appoint to the office) would go to his (the prisoner's) gig. He did not, however, then produce, or show it.

The prisoner was found guilty; the facts to be taken to be,—that he forged the document in question, with the general intent to induce a belief that the document was genuine, and that he was a member of the College of Surgeons, and that he showed it to two persons, with the particular intent to induce such belief in those persons; but that he had no intent in forging, or in the uttering and publishing (assuming there was one), to commit any particular fraud or specific wrong to any individual.

I reserved, for the opinion of the Court of Criminal Appeal, the question whether, on these facts, he ought to have been found guilty on any of the counts?

G. BRAMWELL,

April 29th, 1856.

This case was argued on 3rd *May*, 1856, before JERVIS C. J., WIGHTMAN J., CRESSWELL J., ERLE J. and BRAMWELL B.

Scotland (*E. V. Richards* with him) appeared for the Crown, and *Byrne* for the prisoner.

Byrne, for the prisoner. No offence at common law was committed. The definition of forgery in 2 *Russ. on Crimes and Misdemeanors*, p. 318, is said to be “the fraudulent making or alteration of a writing to the prejudice of another man’s right; and at p. 362 it is said, that the “fraud and intention to deceive constitute the chief ingredients of this offence.” In order to support the conviction, it

must be shown that the prisoner had a definite object in view in the forgery, and intended to commit a fraud upon some individual. This case does not disclose any distinct intention to defraud; and the jury have negatived the intention to commit any particular fraud, or to deceive any individual. The other side will rely on *Reg. v. Toshack (a)*. There the prisoner forged a certificate of the master of a vessel, representing that the prisoner was an able seaman, and had served on board a certain vessel.

1856.

 HODGSON'S
Case.

ERLE J.—This seems very analogous to forging the certificate in that case. The prisoner used the diploma in his endeavours to get appointed to the poor house. If an incompetent man were appointed to such a situation, in consequence of his appearing to have this qualification, a large class of persons might suffer. I do not see any great distinction between the danger of loss of life at sea through the employment of an incompetent pilot, and the danger of loss of life on land through the employment of an incompetent surgeon.

Byrne. The Trinity House certificate of fitness to act as a pilot, which was the thing forged in *Toshack's* case, confers a distinct privilege, and is essential to the employment, and is that upon which those who employ the pilot rely; and in that case an intent to defraud particular persons was alleged, and proved. Here there is only a general intent, and the act is not done by the prisoner for the purpose of obtaining any particular benefit, but merely to induce the belief that he was qualified to act as a surgeon. There is an entire absence of intent to prejudice another person. Suppose a man was to concoct a pedigree, and hang it up in his room for the purpose of raising his credit, that would not be a

(a) 1 Den. C. C. 492.

1856.
 HODGSON'S
 Case.

forgery at common law. The diploma of the College of Surgeons does not confer any distinct qualification to practice as a surgeon; nor did the prisoner produce it for the purpose of procuring the appointment. It was absolutely necessary in *Regina v. Toshack* that the prisoner should produce the preliminary certificate in order to effect his object.

JERVIS C. J.—One test is this, and it is in your favour. Suppose this had been an indictment before Lord Campbell's Act (a) had passed, an intent to defraud some particular person must have been stated—who could have been named? My brother *Wightman* suggests that the intent was to defraud the guardians of the poor; but when the document was forged, it was not forged with that intent.

Byrne. No one could have been named as the person whom it was intended to defraud. There was no intent, at the time when the certificate was altered, to use it for the purpose of defrauding any person. In *Reg. v. Sharman* (b) the prisoner uttered the instrument with a distinct and specific object in view, namely, to obtain the emoluments of the situation of a schoolmaster for which he had applied. In this case no uttering with an intent to defraud is shown.

Scotland, for the Crown. The certificate in this case is a document of a public nature, the forgery of which is in itself criminal, whether any third person be injured by it or not (1 *Hawk. P. C.*, bk. 1, c. 21, s. 11), and therefore the conviction would be supported by evidence of an intention to issue it *malò animo*.

CRESSWELL J.—What do you mean by a document of a public nature?

Scotland. A document which affects all the

(a) 14 & 15 *Vict.* c. 100.

(b) *Dears. C. C.* 285.

public. This diploma is issued by a chartered body, the College of Surgeons, and confers a qualification. The qualification may not be such as to secure in all respects exclusive privileges, but it is an important qualification recognised by law, and the diploma is the only evidence of the qualification.

1856.

HODGSON'S
Case.

WIGHTMAN J.—Suppose it had been the certificate of some eminent surgeon?

Scotland. That, without an act or charter attaching some value to it, would not be of a public nature. A document of a public nature is one which relates to all the subjects of the realm; *Rex v. Ward (a)*. A member of the College of Surgeons is, by statutes relating to vaccination, gaols, poor law unions, lunatic asylums, &c., entitled to various privileges, and he is also exempt from some public obligations, such as serving on juries.

BRAMWELL B.—But the possession of the diploma cannot be said in any way to confer those privileges, which depend upon the statutory enactments.

Scotland. Still they render it a matter of great public importance that none but duly qualified persons should be able to represent themselves as members of the College of Surgeons, and the ill consequences to the public are sufficient to make this a forgery, if done *malo animo*. In *East's Pleas of the Crown*, forgery is defined to be the making or altering of a written instrument “for the purpose of fraud or deceit.” In *2 Russell on Crimes*, p. 357, it is said, “It is clearly agreed that at common law the counterfeiting a matter of record is forgery; for since the law gives the highest credit to all records it cannot but be of the utmost ill consequence to the public to have them either forged or falsified. Also it is

(a) 2 Lord Raym. 1461.

1856. agreed to be forgery to counterfeit any matter of a public nature.”
 HODGSON'S Case.

WIGHTMAN J.—The charge is that of forgery with intent to deceive. The question is, whom did he intend to deceive when the forgery was committed? It may have been done years ago.

JERVIS C. J.—How would you have framed an indictment on these facts before Lord *Campbell's* Act?

ERLE J.—Would it not have been enough to allege an intent to deceive divers persons, to the jurors unknown, to wit, all the patients of his late partner; and would not that have been proved?

Scotland. I submit that it would.

JERVIS C. J.—I should consider that a dangerous doctrine. The intent must not be a roving intent, but a specific intent.

Scotland. There must be a specific intent to defraud, but not to defraud any particular individual. It would, I submit, have been sufficient to show by allegations that the document was of a public nature, setting out the certificate itself. The general intention to defraud appearing on the face of the indictment, and proved by the false making of the certificate, would have been sufficient. In *Rex v. Ward* (a) it appears to have been assumed that if the fraud might injure any one the offence would be committed.

JERVIS C. J.—Hardly so. The words of the indictment in *Rex v. Ward* are “nequiter machinans et intendens præfatum ducem de prædicto alumine decipere et defraudare.” The intent to defraud a particular individual is alleged, the name having been already mentioned.

(a) 2 Lord Raym. 1461.

Scotland. In 2 *Russell on Crimes*, 357, a case is cited from 1 *Levinz*, 138, where it was held that a certificate of holy orders was of a public nature.

1856.

HODGSON'S
Case.

JERVIS C. J.—Upon reference to *Levinz* it appears that the case there was an application for a prohibition to stay proceedings in the Ecclesiastical Court, with a view to deprive the offender of orders, which it was suggested he had obtained by forgery; and the Court refused the prohibition.

Scotland. Section 8 of 14 & 15 *Vict. c. 100.* not only dispenses with the necessity of alleging an intention to defraud any particular person, but also with the necessity of proving it.

JERVIS C. J.—Formerly the indictment must either have alleged an intent to defraud a person named, or, as you say, have shown that that was unnecessary on account of the public nature of the instrument forged. Now, the particular person need not be named, but with that exception the law is not altered. Before the new law whom should you have stated in the indictment the prisoner intended to defraud?

Scotland. Any one of the persons who might be defrauded by the use of the pretended qualification at the time of the forgery; one of the properly qualified practitioners in the immediate neighbourhood, or one of the persons on whom the defendant attended professionally. If necessary to allege and prove a particular intent to defraud, it would be enough to allege any one who might be defrauded. The law infers that a man intends the ordinary consequences of his act. A man may be guilty of forging a bill of exchange, though not actually put in circulation.

Byrne was not called upon to reply.

JERVIS C. J.—I am of opinion that this conviction is wrong. The recent statute for further improving

1856.
HODGSON'S
Case.

the administration of criminal justice (*a*) alters and affects the forms of pleadings only, and does not alter the character of the offence charged. The law as to that is the same as if the statute had not been passed. This is an indictment for forgery at common law. I will not stop to consider whether this is a document of a public nature or not, though I am disposed to think that it is not a public document; but whether it is or not, in order to make out the offence, there must have been, at the time of the instrument being forged, an intention to defraud some person. Here there was no such intent at that time, and there was no uttering at the time when it is said there was an intention to defraud.

WIGHTMAN J.—I am entirely of the same opinion. Before the late statute it was necessary to allege an intent to defraud some one, and there must be an intention to do so now. In this case it does not appear that at the time when the forgery was committed there was an intention to defraud any one.

CRESSWELL J. and ERLE J. concurred.

BRAMWELL B.—I thought that it was of considerable importance that this point should be determined, and I therefore reserved it, but I quite concur in the judgment which has been given.

Conviction quashed.

(*a*) 14 & 15 *Vict.* c. 100.

REGINA v. CHARLES BURGON.

1854.

1856.

THE following case was stated for the consideration and decision of the Court of Criminal Appeal by *Bliss Q. C.*

Charles Burgon was tried before me on *Thursday*, the 20th of *July* 1854, at the Assizes and Sessions of Oyer and Terminer and General Gaol Delivery for the county of *York*, then held at *York Castle*, on an indictment charging him with having obtained upon false pretences a certain valuable security, called a banker's cheque, of the value of 80*l.* from *William Fretson*, his property. The evidence adduced against the prisoner was as follows.

William Fretson (the prosecutor). I am a solicitor, living at *Sheffield*. Last year the prisoner employed me professionally to prepare a contract for building a house and workshop upon land near *Sheffield*. In *December* last, early in the month, the prisoner came to me and asked me for the loan of 80*l.* He told me the builder had finished the house and workshop, and that he (prisoner) was short of money to pay for extras, and that he (prisoner) should have the lease in a day or two. On the 8th of *December* the prisoner came again and brought me the lease [the lease is put in and read, date 13th of *August* 1853, from the governors of the Free Grammar School estates, *Sheffield*, to the prisoner—there is a plan in the margin—the property is all described as in a new street called *Greaves Street*, and with metes and

The prisoner was convicted on an indictment charging him with obtaining a cheque for 80*l.* by false pretences.

The prisoner applied to the prosecutor (a solicitor) for the loan of 80*l.*, and falsely represented that a house had been built by him on certain land, the lease of which he proposed to deposit with the prosecutor by way of security. The prisoner obtained from the prosecutor the loan of 80*l.*, (for which amount the prosecutor gave him his cheque), on the deposit of the said lease, on signing an agreement to execute a mortgage, and on executing a bond. The

land was within three miles of the residence of the prosecutor, who did not, before advancing the money, go to look at it. No house had in fact been built on the land in question, but the prisoner had built a house on another piece of land adjoining, which he had mortgaged to another person. *Held*, that the conviction was right.

1856.
BURGON'S
Case.

bounds]. The prisoner left it (the lease) with me, and he said, "I have built a very capital house on the land, and some workshops, and it is a very nice piece of land; can you lend me the 80*l.* on it without putting me to the expence of a formal mortgage? They are worth near 300*l.*, and I hope you will save me the expence of a mortgage." The prisoner said also, that he had to pay the builder for some extras, that there was a dispute about them, and that he owed a little something on the original contract for building. In consequence, I said that I would let him have the money on the deposit of the lease, and on an agreement to execute a mortgage on my request, and also on his bond. I prepared a memorandum of deposit (the agreement). The prisoner called the next day, and signed the agreement. I gave him the cheque. I was induced to give him the money on the representation that the house and workshops were worth 300*l.*, and built upon the piece of land in the lease. In *February* last, at the end of the month, I made inquiry about the land. I then sent for the prisoner, and said to him, "You have been committing a very gross fraud; the house and workshop which you said you had built on this land were built on another piece, and you have mortgaged them to another solicitor for 250*l.*, and there is nothing built on the land in the lease deposited with me." He (prisoner) said, "I know I have been very wrong; I hope you will forgive me." I said, "No, it is false pretences." He said, he had hoped to be able to bring the money back again before I found it out.

On cross-examination. The land is two miles and a half from *Sheffield* where I live. The land adjoins the land on which the house and workshops are built. There is nothing to distinguish or separate the lands.

When I prepared the contract for building we had some conversation about it. He (the prisoner) said the builder had finished the house and shop, and made a very good shop. I never went to the place before advancing the money. The land, if so built upon, would have been ample security. The house and shop were sold for 250*l*. The prisoner signed the bond and agreement before I gave him the cheque [the bond, the agreement and the cheque put in and read for the prosecution]. It is usual to take a bond as well as a mortgage or an agreement for it. The prisoner cried very much when I said I had found it out. I would not have given him the money unless he had signed the bond and agreement and deposited the lease, nor would I have given him the money on his bond, agreement and deposit of the lease, unless for the false pretence that the house and shop had been built upon the land.

1856.

BURGON'S
Case.

John Townend. I am the surveyor of the Grammar School estate. I have seen the lease and plan, and read the description, and I have seen the land there mentioned, and there is no building on it. The land is of less value without buildings. The land is worth, as building land, 3*s*. 4*d*. per yard per annum. The house and shops are on the adjoining land.

Cross-examination. I set out the land. I could not find out the land in question by the description in the lease. I know Mr. *William Fretson*. I am known as the surveyor of that estate.

John Webster. I am a solicitor at *Sheffield*. I produce a mortgage and lease of land. The lease was deposited with me. I kept the mortgage. I attested it. [The mortgage put in and read; of land, with house and shop thereon, from the prisoner to witness].

1856.

BURGON'S
Case.

Upon this evidence it was contended, on the part of the prisoner, that the proximate cause of obtaining the cheque and money was the contracts of bond and mortgage, and that the false pretence was only an antecedent inducement to the prosecutor to enter into those contracts, and lend the money upon such securities; and, there being no question of the *bona fides* of the transaction of loan, except the false pretence that preceded it, the jury ought to be directed that the evidence proved that the money was not obtained upon the false pretences stated in the indictment.

Having doubts upon this point I reserved the question, and, in order that it might be submitted to the Court of Criminal Appeal, directed the jury that, if they believed the witnesses, there was sufficient evidence of the offence charged in the indictment.

The jury accordingly found the prisoner guilty, and I did not pass sentence, and have now humbly to request the opinion of this Court upon the propriety of that conviction, and upon the question so reserved; and I respectfully annex copies (a) of the indictment and of the bond and agreement of mortgage to be referred to as part of this case.

HENRY BLISS,
20th November, 1854.

(a) The following are copies of the documents here referred to.

INDICTMENT.

<p>Yorkshire } to wit. }</p>	<p>The jurors for our lady the Queen upon their oaths present that <i>Charles Burgon</i> late of the parish of <i>Sheffield</i> in the county of <i>York</i> on the 9th day of <i>December</i> in the year of our Lord 1853 at the parish aforesaid in the county aforesaid unlawfully wilfully and knowingly did falsely pretend to <i>William Fretson</i></p>	<p>that he the said <i>Charles Burgon</i> had built a capital house and workshops worth nearly three hundred pounds upon a certain piece of land before then demised to him the said <i>Charles Burgon</i> by and under a certain indenture of lease which he the said <i>Charles Burgon</i> then and there presented to and deposited with the said <i>William</i></p>
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This case was argued on the 3rd day of *February*, 1856.
 1855, before JERVIS C. J., PARKE B., MAULE J.,
 BURGON'S
 Case.

Fretson by means of which false pretence the said *Charles Burgon* then and there unlawfully knowingly and wilfully did obtain of and from the said *William Fretson* a certain valuable security commonly called a banker's cheque of the chattels and valuable securities of the said *William Fretson* of the value of eighty pounds with intent thereby then and there to cheat and defraud whereas in truth and in fact the said *Charles Burgon* had not built any house or workshops upon the said piece of land hereinbefore mentioned as he the said *Charles Burgon* then and there well knew to the great damage and deception of the said *William Fretson* to the evil example of all others in like case offending against the form of the statutes in such case made and provided and against the peace of our lady the Queen her crown and dignity.

2nd Count. And the jurors aforesaid upon their oaths aforesaid do further present that the said *Charles Burgon* on the 9th day of *December* in the year of our Lord 1853 at the parish aforesaid in the county aforesaid unlawfully wilfully and knowingly did falsely pretend to the said *William Fretson* that he the said *Charles Burgon* had built a capital house and workshops worth nearly three hundred pounds upon a certain piece of land before then demised to him the said *Charles Burgon* by and under a certain indenture of lease which he the said *Charles Burgon* then and there presented to and deposited with the said *William Fretson* by means of which false pretence the said *Charles Burgon* then and there un-

lawfully knowingly and wilfully did obtain of and from the said *William Fretson* a certain chattel commonly called a banker's cheque of the chattels and valuable securities of the said *William Fretson* of the value of eighty pounds with intent thereby then and there to cheat and defraud whereas in truth and in fact the said *Charles Burgon* had not built any house or workshops upon the said piece of land hereinbefore mentioned as he the said *Charles Burgon* then and there well knew to the great damage and deception of the said *William Fretson* to the evil example of all others in like case offending against the form &c. and against the peace &c.

3rd Count. And the jurors aforesaid upon their oaths aforesaid do further present that immediately before the committing by the said *Charles Burgon* of the offence hereinafter next mentioned he the said *Charles Burgon* did present and show to the said *William Fretson* a certain indenture bearing date the 30th day of *August* in the year of our Lord 1853 made by and between the governors of the goods possessions and revenues of the Free Grammar School of *James King of England* within the town of *Sheffield* in the county of *York* of the one part and the said *Charles Burgon* of the other part. And the jurors aforesaid upon their oath aforesaid do further present that the said *Charles Burgon* on the said 9th day of *December* in the year of our Lord 1853 at the parish aforesaid in the county aforesaid unlawfully wilfully and knowingly did falsely pretend to the said *William Fretson* that a house and work-

1856. WIGHTMAN J., CRESSWELL J., ERLE J., PLATT B.,
BURGON'S WILLIAMS J., and CROMPTON J.
Case.

shops worth nearly three hundred pounds had been built upon a certain piece of land mentioned in the said indenture and by the said indenture purported to be demised to the said *Charles Burgon* by means of which said last mentioned false pretence the said *Charles Burgon* then and there unlawfully and wilfully and knowingly did obtain of and from the said *William Fretson* a banker's cheque for eighty pounds of the chattels and valuable securities of the said *William Fretson* of the value of eighty pounds with intent thereby then and there to cheat and defraud whereas in truth and in fact neither a house and workshops nor a house nor a workshop had been built upon the said last mentioned piece of land as he the said *Charles Burgon* then and there well knew to the great damage and deception of the said *William Fretson* to the evil example of all others in like case offending against the form &c. and against the peace &c.

4th Count. And the jurors aforesaid upon their oaths aforesaid do further present that the said *Charles Burgon* on the said 9th day of

December in the year of our Lord 1853 at the parish aforesaid in the county aforesaid unlawfully wilfully and knowingly did falsely pretend to the said *William Fretson* that he the said *Charles Burgon* had built a capital house and workshops worth nearly three hundred pounds upon a certain piece of land situated at or near *Walkley* in the parish of *Sheffield* in the county aforesaid by means of which last mentioned false pretences the said *Charles Burgon* then and there unlawfully wilfully and knowingly did obtain of and from the said *William Fretson* a banker's cheque for eighty pounds of the value of eighty pounds of the chattels and valuable securities of the said *William Fretson* with intent to cheat and defraud whereas in truth and in fact the said *Charles Burgon* had not built a capital house and workshops or any house or workshop upon the said last mentioned piece of land as he the said *Charles Burgon* then and there well knew to the great damage and deception of the said *William Fretson* to the evil example of all others in like case offending against the form &c. and against the peace &c.

BOND.

Know all men by these presents that I *Charles Burgon* of *Sheffield* in the county of *York* spring blade manufacturer am held and firmly bound to *William Fretson* of *Sheffield* in the county of *York* gentleman in the sum of one hundred and sixty pounds of lawful money of *Great Britain* to be paid to the said *William Fretson* or his certain attorney executors ad-

ministrators or assigns for which payment to be well and truly made I bind myself my heirs executors and administrators and every of them firmly by these presents sealed with my seal. Dated the 9th day of *December* in the year of our Lord 1853.

The condition of the above written bond or obligation is such that if the said *Charles Burgon* his heirs

STAMP
2s. 6d.

Hardy appeared for the Crown, and *Bell* for the prisoner.

1856.

BURGON'S
Case.

Bell, for the prisoner. First, the prosecutor did not advance the money in consequence of the verbal pretence used by the prisoner, but on the contrary he took the bond and equitable mortgage as his security, and thus what passed by parol was afterwards embodied in those documents, and the representation made

executors or administrators should well and truly pay or cause to be paid unto the said *William Fretson* his executors administrators or assigns the full sum of eighty pounds of lawful money of *Great Britain* with interest for the same after the rate of five pounds per centum per annum on demand without any deduction or abatement whatsoever

then the above written bond or obligation shall be void and of no effect or otherwise shall be and remain in full force and virtue.

Charles Burgon (L. s.)

Sealed and delivered being
first duly stamped in the
presence of

Jos. Bartholoman

Clerk to *William Fretson*.

MEMORANDUM.

I *Charles Burgon* of *Sheffield* in the county of *York* spring blade manufacturer have this day deposited with *William Fretson* of *Sheffield* aforesaid gentleman an indenture of lease dated the 30th day of *August* last and made between the Governors of the goods possessions and revenues of the Free Grammar School of *James King* of *England* within the town of *Sheffield* in the county of *York* of the one part and me the said *Charles Burgon* of the other part of and concerning a piece or parcel of ground situate at or near *Walkley* in the parish of *Sheffield* aforesaid for securing to the said *William Fretson* on demand the repayment of the sum of eighty pounds this day lent and advanced by him to me with interest for the same at the rate of five pounds per centum per annum and as a further secu-

rity I have also this day given to the said *William Fretson* my bond in the penal sum of one hundred and sixty pounds for securing to him the sum of eighty pounds and interest and I hereby agree and undertake whenever thereunto required by the said *William Fretson* and at my own costs and charges to execute a good valid and effectual mortgage of the said premises comprised in the said lease and dwelling houses workshops and other buildings erected thereon for securing the repayment of the said sum of eighty pounds and interest so intended to be secured as aforesaid such mortgage deed to contain the usual powers of sale indemnity to purchasers and other covenants and clauses incidental thereto as the said *William Fretson* shall think fit. Dated this 9th day of *December* in the year of our Lord 1853.

1856. BURGON'S
Case. by the prisoner formed a constituent part of the written contract. On this point every case which can be cited either for the Crown or for the prisoner has been fully discussed to-day in the case of *Regina v. Eagleton* (a). The substantial question is, whether the decision of *Littledale J.* in *Rex v. Codrington* (b) can be supported, or whether that decision is overruled by the subsequent cases of *Regina v. Kenrick* (c) and *Regina v. Abbott* (d). The marginal note in *Regina v. Kenrick*, so far as it applies to this case, is, "a false pretence knowingly made to obtain money is indictable, though the money be obtained by means of a contract which the prosecutor was induced by the falsehood to make;" and undoubtedly in Lord *Denman's* judgment in that case it was so said, but such a decision was not necessary to the judgment. The first three counts of the indictment in *Regina v. Kenrick* were for a conspiracy by false pretences to obtain divers large sums of money; and although there were two other counts charging the statutable offence of obtaining money by false pretences, the counsel for the Crown, at the commencement of the argument, admitted that those counts could not be supported (e), and the judgment of the Court proceeded on the three first counts only. Sir *F. Thesiger*, who appeared for the Crown, did not seek to overrule *Regina v. Codrington*, for he says (f), *arguendo*, "It is true there may be false affirmations without an indictable crime," and for this he cites the case of *Regina v. Codrington* and other cases.

(a) The case of *Regina v. Eagleton* had been elaborately argued immediately before. See *Dears. C. C.* 515.

(b) 1 *Car. & P.* 661.

(c) 5 *Queen's Bench Rep.* 49.

(d) 1 *Den. C. C.* 273; *S. C.* 2 *Car. & K.* 630.

(e) The objection to those counts was that they did not say to whom the security which was obtained by the false pretences belonged.

(f) 5 *Queen's Bench Rep.* 54.

That part of the judgment in *Regina v. Kenrick*, which applies to the counts on false pretences, was extrajudicial; and the judgment in *Regina v. Codrington* may well be law, although *Regina v. Kenrick* was properly decided. The case of *Regina v. Abbott* (a) is also distinguishable from *Regina v. Codrington* in this, that in the former case there was a false token used to put the prosecutor off his guard, and prevent him from using those means of ascertaining the quality of the article he was about purchasing, which prudence would suggest; and *Regina v. Abbott* is also distinguishable from the present case, because in *Regina v. Abbott* the false pretence was as to the entire subject-matter of the contract.

In *Regina v. Codrington* the prisoner had sold an estate with a covenant for title, having previously sold his interest to another person; and it was objected by the prisoner's counsel, that the prosecutor did not advance his money in consequence of the verbal pretence which it was proved had been used by the prisoner, but took the covenant as his security; and *Littledale J.* decided in favour of that objection, and said in his judgment, "Here the party bought the property, and took as his security a covenant that the vendor had a good title. If he now finds that the vendor has not a good title he must resort to the covenant. This is only a ground for a civil action." So here the prosecutor took the agreement and bond as his security, and must resort to them for his remedy.

Secondly, it has been doubted whether the statute as to false pretences applies to cases where the thing obtained is procured by way of loan. In this case

1856.

BURGON'S
Case.

(a) 1 Den. C. C. 273; 2 Car. & K. 630.

1856.

BURGON'S
Case.

the money was not parted with absolutely, but the prosecutor expected to have it returned; and although in such a case the facts might be such as to constitute a larceny, in which case the prisoner was liable to be convicted on this indictment, that question was not put to the jury. The only decision I can find on this point is in *Rex v. Crossley (a)*, in which *Patteson J.* said, that the terms of the act embraced every mode of obtaining money by false pretences by loan as well as by transfer; but this position is queried by the learned editor of *Russell on Crimes* in a note (*b*), in which he says that the correct distinction between larceny and false pretences seems to be, that in the former the property was not parted with, in the latter it was (*c*).

Sir *G. Lewin*, who appeared for the prisoner in *Rex v. Crossley*, did not call the attention of *Patteson J.* to any of the cases to which Mr. *Greaves* refers in his note.

CROMPTON J.—Where a chattel is lent the chattel does not pass, but money that is lent passes as much in a case of loan as on a sale. There was no expectation that the same money which was obtained would be returned.

Bell. That observation will no doubt apply in every case of a money loan. There is however no decision on this point except *Rex v. Crossley*, and in that case there was an acquittal; and the decision, which could not be reviewed, has since been questioned.

Thirdly, *caveat emptor* applies. This is a transac-

(a) 2 Moo. & Rob. 17.

(b) 2 Russ. on C. & M., by Greaves, 305.

(c) The cases referred to by Mr. Greaves are: *Rex v. Davenport*, Arch. Peel's Acts, 4; *Rex v. Savage*, 5 Car. & P. 143; *Rex v.*

Robson, Russ. & Ry. 413; *Rex v. Nicholson*, 2 East, P. C. 669; *Rex v. Adams*, Russ. & Ry. 225. See also *Rex v. Johnson*, 2 Den. C. C. 310; *Regina v. Cohen*, Ibid. 249, and *Regina v. Barnes*, Ibid. 59.

tion in which the prisoner could not have deceived the prosecutor if the prosecutor had exercised common prudence. The prosecutor was an attorney, who we might have supposed was well capable of looking after his own interest in a matter of this kind; the property proposed to be mortgaged was only two miles from the prosecutor's house, and nothing could have been easier than for him to have ascertained for himself whether there was a house upon the land or not.

Hardy, for the Crown. This case is within the statute. If the prosecutor was induced to part with his money by reason of the false pretence the offence was completed; and the fact that the false pretence leads to a contract under which the money is advanced does not make it the less an obtaining money by false pretences. The prisoner alleged that he would mortgage the house upon the land, he knowing that there was no house there, and that false representation is contained also in the agreement.

The case of *Regina v. Abbott* (a) was like this although the subject-matter was cheese and not land; the cheese there was analogous to the land here; and the false pretence as to the house in this case is analogous to the tasters in that. The main question in this case is governed by the decision in *Regina v. Abbott* and by *Regina v. Kenrick* (b), on which it was founded. *Rex v. Codrington* (c) has always been considered overruled, and, if not, it was distinguished by *Patteson J.* in *Rex v. Crossley* (d), on the ground that it did not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling.

1856.

BURGON'S
Case.

(a) 1 Den. C. C. 273; S. C. 2
Car. & K. 630.

(c) 1 Car. & P. 661.

(d) 2 Moo. & Rob. 17.

(b) 5 Queen's Bench Rep. 49.

1856.

BURGON'S
Case.

PARKE B.—In *Rex v. Codrington* the question was as to the admission of the deed in evidence to prove the false pretence. But there the prosecutor got nothing for his money; here he gets a *quid pro quo* in part for his money. He gets the lease of the land.

Hardy. In that respect, at all events, that case is overruled by *Regina v. Abbott*; there the prosecutor got something for his money. It is not necessary that the prosecutor should rely exclusively upon the false pretence, but it is enough if the false pretence operates to induce him to part with his money. In *Hamilton v. Regina* (a), where the defendant obtained a valuable security by falsely representing that he was a captain in the dragoons; it was held unnecessary to show in the indictment how the pretence operated. Here the false statement was continued throughout the transaction, and the circumstance that there was a written contract and other securities makes no difference. In *Regina v. Adamson* (b), the prisoner obtained 200*l.* by a false representation that he had been appointed emigration agent at a certain port, and that he would share the salary with the prosecutor, and he was convicted; although, before the prosecutor parted with his money, he was induced to enter into a deed of partnership with the prisoner in which no mention was made of the agency.

MAULE J.—This was a misrepresentation of the quality of the land. Suppose a false statement had been made as to the quality of a horse, as that he had won races, an indictment could not be supported.

PARKE B.—*Regina v. Adamson* is no authority on this part of the case.

JERVIS C. J.—The question seems to be whether the cheese case is law; that is a very strong case.

(a) 9 Queen's Bench Rep. 271.

(b) 2 Moo. C. C. 236; S. C. 1 Carr. & Kir. 192.

CROMPTON J.—Here there is a misdescription of the estate. Suppose the prisoner had offered an estate for sale as having good drains, which was not true; you must go the length of saying that would be indictable.

1856.

BURGON'S
Case.

Hardy. The authorities would support that position.

JERVIS C. J.—I must confess I do not feel any difficulty in consequence of the criminal law trenching on the law of contracts and rules of trade. I say so much the better.

Hardy. As to the second point: *Patteson J.* expressly overrules it in *Rex v. Crossley (a)*; and though the editor of *Russell* has suggested a doubt as to that decision, the rest of the note which he has written, and the cases to which he refers, are not inconsistent with the position that the statute applies to the case of a loan as well as any other transfer of money induced by a false pretence.

Bell, in reply. The house is part of the land, and the misrepresentation was in fact a misrepresentation of the value of the land.

WIGHTMAN J.—But the house was not upon the land at all; that fact was misrepresented by the prisoner.

Bell. Just so; but that was not the less a misrepresentation of the value of the land of which the house, if it had been erected, would have been part; and would have passed by a conveyance of the land though not mentioned therein.

Cur. adv. vult.

The judgment of the Court was given on the 3rd day of *May*, 1856.

JERVIS C. J.—This was a case where a party obtained an advance of money upon a representation

(a) 2 Moo. & Rob. 17.

1856. that a house had been built upon some land which
 BURDON'S he proposed to mortgage when in fact it was not so.
 Case. We think we are in this case bound by authority, and
 the conviction will be affirmed.

CROMPTON J.—As I am unable to distinguish this
 case from *Regina v. Abbott*, I am of the same
 opinion.

Conviction affirmed (a).

(a) *Parke B.* and *Maule J.* had terval between the argument and
 retired from the Bench in the in- the judgment.

per 201

1855.
 1856.

REGINA v. WILLIAM ROEBUCK.

The prisoner
 was indicted
 for obtain-
 ing money
 by false pre-
 tences. It
 appeared that
 the prisoner
 offered a chain
 in pledge to a
 pawnbroker,
 falsely and
 fraudulently

THE following case was reserved and stated for the
 consideration and decision of the Court of Criminal
 Appeal by the Recorder of *Liverpool*.

The prisoner, *William Roebuck*, was indicted at the
Liverpool Borough Sessions, held on the 28th day of
August, 1855, for fraudulently obtaining ten shillings
 by falsely pretending that a chain was a silver chain.
 stating that it was a silver chain, whereas in fact it was not silver; but was made of a
 composition worth about a farthing an ounce. The pawnbroker tested the chain, and
 finding that it withstood the test he, relying on his own examination and test of the
 chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten
 shillings, the sum he asked, and took the chain as a pledge. *Held*, that if the money
 had been obtained by the statement made by the prisoner, he might have been convicted
 of obtaining it by false pretences; but that as the prosecutor relied entirely upon his
 own examination, and not upon the false statement, the prisoner was properly found
 guilty of an attempt to commit that offence.

Upon the trial of the indictment evidence was admitted to prove that the prisoner, a
 few days after the commission of the above offence, offered a similar chain in pledge to
 another pawnbroker; and that twenty-six similar chains were found upon the person of
 the prisoner when he was apprehended. *Held*, that the evidence was properly admitted.

The prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver; the prisoner replied that it was silver. The pawnbroker then examined the chain and tested it with an acid. The chain resembled in appearance greasy silver, and withstood the test as if it were silver. The pawnbroker then lent the prisoner ten shillings on the chain, which he took as a pledge. He paid this money relying on his own examination and test of the chain, and without placing any reliance on the statement of the prisoner. Evidence was admitted to prove that the prisoner, a few days afterwards, offered a chain similar in appearance to another pawnbroker, requesting him to advance ten shillings upon it. Objection was made to the admission of this evidence. Twenty-six similar chains were found on the person of the prisoner when he was apprehended. An assayer proved that these chains were not silver and that the chain pledged was not silver; they were all made of a composition worth about a farthing an ounce, and each chain was of much less value than ten shillings.

1856.

ROEBUCK'S
Case.

The jury were told that as the money had not been obtained by the prisoner's statement, the completion of the offence charged in the indictment was not proved; but that if they were satisfied of the fraudulent intent of the prisoner, and that his design was to obtain the money by means of his false statement, they might convict the prisoner of an attempt to commit the misdemeanor charged against him in the indictment. The jury accordingly found the prisoner not guilty of the misdemeanor charged in the indictment, but guilty of an attempt to commit the same.

The prisoner was also tried on another indictment on a similar charge, and with a similar result.

The prisoner was sentenced on each indictment to

1856.

ROEBUCK'S
Case.

twelve calendar months' imprisonment, the terms to commence at the same time. Under these sentences he is still in custody in *Liverpool* borough gaol.

The questions intended to be submitted for consideration are: Whether there was any false pretence within the meaning of the statute 7 & 8 *Geo.* 4. c. 29.? Whether the evidence objected to was properly received? And whether the prisoner was properly convicted of the attempt to commit the misdemeanor charged against him? *Gilbert Henderson,*

Recorder of the borough of *Liverpool*.

This case was argued on 24th *November*, 1855, before JERVIS C. J., PARKE B., WIGHTMAN J., CRESSWELL J. and WILLES J.; and was afterwards re-argued on 30th *November*, 1855, before Lord CAMPBELL C. J., JERVIS C. J., PARKE B., ALDERSON B., WIGHTMAN J., CRESSWELL J., ERLE J., PLATT B., WILLIAMS J., CROMPTON J. and WILLES J.

Brett appeared for the Crown; no counsel appeared for the prisoner.

Brett, for the Crown (a). The question is, whether, if the prosecutor in this case had advanced the money without relying upon a test, the prisoner could, in consideration of law, have been found guilty of obtaining money by false pretences. It was conceded by the Court, on the former argument, that if he could have been, he was in this case properly convicted of the attempt, because he had clearlyd one all that lay upon him to do to complete the offence; *Regina v. Eagleton* (b).

(a) The argument on 24th *November* is omitted, as every thing then urged by the counsel for the Crown was included in the subsequent argument. The question raised in the case as to the admissibility of the evidence was not then adverted to, nor is it referred

to in the judgment; but it appeared to be conceded by the Judges on the first argument that that question was decided by *Regina v. Taverner*, 4 Car. & P. 413 (a), and *Regina v. Foster*, Dears. C. C. 456.

(b) Dears. C. C. 376. 515.

To say that a prisoner is guilty of obtaining money by false pretences is a compound proposition. It is, first, that the prisoner made a statement of that which, if true, would be an existing fact; secondly, that such statement was untrue; thirdly, that the prisoner, when he made it, knew it to be untrue; fourthly, that he made it with a fraudulent intent; and, fifthly, that the money was obtained by the false pretence. The objection suggested in this case pointed to the last of these propositions, and is, that in consideration of law the money could not, in this case, have been obtained by the false pretence, because, in consideration of law, it must have been taken to have been advanced for the chain, and not in consequence of the false pretence. The proposition must be carried as high as to say, that wherever, in such cases, goods are passed, or a contract is made, it is matter of law that the money cannot be said to have been obtained by the false pretence; because, if it is a question for the jury, and they may find, notwithstanding that goods have passed or a contract has been made, that the money was obtained by the false pretence, the jury in this case have found that the prisoner attempted so to obtain money.

1856.

ROEBUCK'S
Case.

PARKE B.—Does the statute apply to a case in which the false statement is merely as to the value of an article? It was the impression of many of us in *Regina v. Burgon* (a) that it did not.

JERVIS C. J.—Is not this case within the exact words of the act, and within the authorities of *Regina v. Kenrick* and other cases?

Brett. I submit that the question, whether the money was obtained by the false pretence alleged, is in all cases a question for the jury. It may be that a

(a) *Ante*, p. 11.

1856.

ROEBUCK'S
Case.

false statement as to the value of an article is not within the statute, but that is because a statement of the value is not the statement of a fact, but only of an opinion or judgment; but in this case the statement was of the quality of the goods. The objection, therefore, is, that the statute does not apply to misrepresentations as to the quality of goods in the course of a bargain respecting them, because in such cases the goods or the contract are the consideration for the money, and the statement cannot be the cause of its payment. But in such case it seems clear that the prosecutor would have been induced to enter into the contract by a fraudulent misrepresentation as to the subject-matter of it; and a contract so obtained would be void for all civil purposes, and might be treated as abrogated, and an action brought in case for the false representation. Then, can such a contract be held to give validity to a transaction which would otherwise be criminal? If not, then in each case it must be a question for the jury, whether the money was advanced upon the faith of the contract, or upon the false pretence; and it is not true as a universal proposition, that the money cannot be said to be advanced upon the false pretence when there is a contract under which the money passes. It may be shown by example that the money may, as matter of fact, have been advanced on the pretence and not on the contract, or in consequence of the delivery of the goods. Suppose a horse dealer to offer a horse for sale to a gentleman wanting one for his daughter to ride, who, on seeing the horse, declines to buy it as being too restive, and the dealer then knowingly and falsely asserts, that the horse has been always ridden by a lady, and was never out of her stable until put into his hands the day before; and thereupon the gentleman pays a large price and accepts the horse.

The money would have been refused upon the mere proposed delivery of the horse, and for the horse, but would have been advanced solely in consequence of the false pretence, which is the case of *Regina v. Kenrick* (a).

1856.
ROEBUCK'S
Case.

CRESSWELL J.—Suppose a man offering wheat for sale at market says, “I got one hundred shillings a quarter for wheat of this kind at *Leeds* market the other day,” and thereby induces another to give him one hundred shillings a quarter; would he, if the statement were false, be indictable for obtaining money by false pretences?

Brett. Yes.

JERVIS C. J.—Are you to bend the law to a dishonest system of trade, or shall not dishonest trading be made to bend to the law?

PARKE B.—It would be going an alarming length to say that a man could be indicted and transported for warranting a horse sound, which he knows to be unsound. Suppose he did not warrant it, but said it was sound?

Brett. If he knew it was unsound he should be punished, and is within the statute.

LORD CAMPBELL C. J.—Is there in this case anything more than a false statement as to the value of the article?

Brett. Yes; it is a false statement as to the quality of it.

ALDERSON B.—If the false representation be confined to the value, I do not see how the statute can apply; because, unless the thing were wholly worthless the statement would be partly true and partly false, and how could the line be drawn?

Brett. According to the case of *Rex v. Ady* (b),

(a) 5 Queen's Bench Rep. 49.

(b) 7 Car. & P. 140.

1856.
ROEBUCK'S
Case.

it is sufficient if the mind of a prosecutor was influenced partly by a false pretence; but in this case the representation was wholly false, because the chain was not silver, and was altogether a different thing from that which it was represented to be. The objection taken is too refined. If a tradesman, on the sale of a diamond pin, intentionally keep it back and hand to a purchaser for his money a piece of empty paper, it is admitted he would obtain the money by a false pretence within the statute; but if he handed him in the paper a tinfoil pin with a piece of glass in it, it is said that the case would not be within the statute. The difference is inappreciable. So if a person were to sell a gold chain which, for the purpose of fraud, he should describe as hidden in a particular place where the purchaser might find it, and obtains money, but the chain were not there, it is admitted it would be within the statute; but it is said that if he had fraudulently placed a leaden chain there the statute would not apply. This conviction is supported by the authorities. In *Regina v. Kenrick (a)* the defendant, upon the sale of some horses, falsely represented that the horses were the property of a lady, were quiet to ride and drive, and were not the property of any horse dealer; and the prosecutor, relying upon that statement, bought the horses. There the prisoner was held guilty of obtaining money by false pretences, although the prosecutor had accepted the horses.

CRESSWELL J.—Did not the decision in that case proceed on the counts for conspiracy?

Brett. Yes; but in the judgment Lord *Denman* C. J. says, that the execution of a contract between the same parties does not secure from punishment the obtaining of money under false pretences in con

(a) 5 Queen's Bench Rep. 49.

formity with that contract; and upon the authority of this case *Regina v. Abbott* (a) was decided. There the prisoner induced the prosecutor to buy a particular cheese by falsely pretending that the "tasters" which he took from the cheese were part of it, whereas in truth the "tasters" had been taken from a cheese of a superior character, and fraudulently inserted in the cheese that was sold. The prisoner was convicted, and the Judges, upon consideration, confirmed the conviction, although the prosecutor had accepted and taken away the cheese.

PARKE B.—Was that case argued by counsel?

Brett. No; but it is a considered judgment by POLLOCK C. B., PARKE, ALDERSON and ROLFE Bs., COLTMAN, MAULE, WILLIAMS, COLERIDGE and WIGHTMAN Js.

JERVIS C. J.—It was decided before the establishment of the Court of Criminal Appeal.

PARKE B.—We relied on the authority of *Regina v. Kenrick*, and if that be bad law the decision in *Regina v. Abbott* cannot be supported.

Brett. In *Regina v. Ball* (b), which was decided before *Regina v. Kenrick*, the facts were the same as in the present case. The prisoner pretended that eleven thimbles, which he produced to a pawnbroker, and on which he asked five shillings, were silver; but the thimbles were tested, and found not to be silver, and nothing was advanced upon them. This was held to be an attempt to obtain money by false pretence. In *Reg. v. Ball*, a case of *Regina v. Tabram*, said to have been tried before *Adams* Serjt., was cited. There the prisoner falsely pretended to a pawnbroker, on one occasion, that a certain material, which he produced, was "gold shruff;" and on another occa-

1856.
ROEBUCK'S
Case.

(a) 1 Den. C. C. 273.

(b) Car. & Marsh. 249.

1856.
ROEBUCK'S
Case.

sion that an article he produced was "ribbon gold," and it appeared that gold shruff and ribbon gold were worth 3*l.* 18*s.* an ounce; but the article which the prisoner produced was worth only 18*s.* an ounce. The prisoner was convicted; but *Adams* Serjt. afterwards mentioned the case to several of the Judges, and they were of opinion that the mere assertion that the article produced was what in fact it was not was not sufficient to sustain the conviction. It is quite clear, however, that the Judges who were consulted in *Regina v. Ball* were not satisfied with the account of that case, and overruled it.

In the case of *Regina v. Stephens* (a) the prisoner represented that certain ingots which he sold to the prosecutor were silver, whereas they were not, and thereby obtained money from the prosecutor, who kept the ingots, and it was held that the prisoner was rightly convicted.

The objection that the money was obtained by a contract and not by the false pretence, must, if valid, have prevailed in *Regina v. Copeland* (b). There the defendant pretended that he was an unmarried man, and thereby obtained a promise of marriage from the prosecutrix, who afterwards refused to marry him. On such refusal he falsely pretended that he was an unmarried man, and entitled to bring an action against the prosecutrix for breach of promise of marriage, by means of which he obtained from her 100*l.* Lord *Denman* C. J. left it to the jury to say whether the money was obtained by the false pretence that the prisoner was single, and on their finding that it was, Lord *Denman* C. J. and *Maule* J. were both of opinion that the evidence was sufficient to support the verdict; and *Maule* J. was further of opinion, that

(a) 1 Cox C. C. 83.

(b) Car. & Marsh. 516.

the pretence of the prisoner that he was entitled to maintain an action for breach of promise of marriage was a sufficient false pretence within the statute. I admit that this last proposition seems to go rather far as to what is a representation of that which, if true, would be an existing fact.

1856.

ROEBUCK'S
Case.

PARKE B.—Yes it does.

Brett. I quote the case to shew that where there is a contract it is not necessarily fatal to an indictment, and that the question whether the money was obtained by the fraud or by the contract is for the jury. In *Regina v. Adamson* (a) the prisoner, by falsely representing that he had been appointed an emigration agent, induced the prosecutor to enter into a contract of partnership by deed, and pay him a sum of money, and it was held that he was rightly convicted of obtaining the money by false pretences.

CRESSWELL J.—There the prisoner induced the prosecutor to contract for the purchase of something which he did not possess; but here the prisoner offers a particular thing, which he has, though he makes a misrepresentation as to its quality.

JERVIS C. J.—It is admitted that if a man professes to sell me a carriage, which he fraudulently states he has in his possession, and thereby induces me to pay for it beforehand, and he has not in fact got one, he obtains the money from me by false pretences; but it is said, that if I ask him for a gold chain, and he gives me a brass one, asserting that it is gold, he is not guilty of an indictable false pretence. I do not see the distinction; in the one case I do not get the carriage, and in the other I do not get the gold chain.

PARKE B.—In the one case you get nothing, in the other you get something. Suppose an estate is

(a) 2 Moo. C. C. 286.

1856.
ROEBUCK'S
Case.

not of so much value as it is represented to be, you get a *quid pro quo* for a great part of your purchase money. If a variance between the thing contracted for and the thing delivered under the contract rendered a man indictable, there would be no end of indictments, and it would render an immense number of transactions in common life the subject of criminal proceedings.

Brett. The non-fulfilment of a contract is clearly not within the statute, nor a criminal offence. A mere contract is no assertion of anything, but only an alternative undertaking, as to do a certain act, or deliver a certain thing, or on failure to pay damages. That is the ruling in *Rex v. Codrington* (a); but if, in the course of contracting, a wilfully false statement of a fact is made, the question is raised which is now under discussion. In *Regina v. Archer* (b) the prisoner, by falsely pretending that he was well-known to *Smith & Co.* persuaded the prosecutors to enter into a contract with him, under which goods were delivered, and it was held, notwithstanding the contract, that the prisoner was rightly convicted. And in *Regina v. Blomfield* (c), where the prisoner induced the prosecutrix to purchase a bottle of medicine, which she accepted and took away, by falsely pretending that he was the person who had cured a particular patient, the prisoner was convicted and punished.

PARKE B.—That was not a false pretence as to the quality of the article sold. People must be careful how they commend the goods they sell, if they are to be prosecuted for it.

Brett. In *Rex v. Freeth* (d) it was held that

(a) 1 Car. & P. 661.

(b) Dears. C. C. 449.

(c) Car. & Marsh. 537.

(d) Russ. & Ry. C. C. 127.

uttering a forged note as a genuine one was within the statute; and so in *Regina v. Coulson* (a), where the prisoner passed, and the prosecutor accepted, a note on a bank of Elegance for a bank note. In *Rex v. Parker* (b) the prisoner gave, in payment for a watch, a check on a bank where he had no account, and it was held that the pretence thereby acted that he had funds at the bank was sufficient, though the cheque had passed between the parties. In *Rex v. Reed* (c) the prisoner had sold coals with a false representation of their weight. That case was tried before *Tindal* C. J., and the prisoner was convicted; but it appears from the report that the prisoner's counsel having moved in arrest of judgment, the question whether the false pretence was within the statute was reserved; and in the ensuing Term the case was considered by the Judges, who held the conviction wrong. The decision seems to have turned upon a point of pleading, and Lord *Denman*, in *Hamilton v. Regina* (d), on this case being cited said, "I am sure that *Rex v. Reed* was not before the Judges. That decision is not overruled now, for it never took place" (e). The case is also observed on by *Parke* B. in *Regina v. Bates* (f).

1856.

ROEBUCK'S
Case.

(a) 1 Den. C. C. 592.

(b) 7 Car. & P. 825.

(c) 7 Car. & P. 848.

(d) 9 Queen's Bench Rep. 279.

(f) 3 Cox. C. C. 201.

(e) *Carrington, amic. cur.* stated that Mr. *Straight*, the Clerk of Assize, had searched the Circuit Records, and had found that the case of *Regina v. Reed* had in fact been considered by the Judges. It may also be observed, that the case is referred to in a note to *Regina v. Ball* (Car. & Marsh. 253), as having been decided by the

fifteen Judges. The following extract from the Home Circuit Records has been furnished by Mr. *Straight*.

"*Sussex* Lent Assizes, 1837.—
Verdict.

"Puts.—Jury say Guilty.

"*Henry Reed*.—Unlawfully, by false pretences, obtaining from *Lawrence Coppard* a sovereign, with intent to cheat and defraud him of part thereof, to wit 10s.

"Judgment respited on a point of law, and having entered into

1856.

ROEBUCK'S
Case.

In *Regina v. Barnard* (a) the prisoner, by representing that he was an undergraduate, obtained credit on a contract, yet it was held that he was rightly convicted.

In *Regina v. Wells* (b), tried before *Littledale, J.*, at the *Lent* Assizes on the Home Circuit in 1840, the prisoner was indicted, for that he had pretended that a piece of paper of no value, which he produced to the prosecutrix, was a bank of *England* note for 5*l.*, and of the actual value of 5*l.*, whereas, &c. The note was a bank of *Elegance* note tendered for 5*l.* The prisoner told the prosecutrix it was a bank of *England* note. The prosecutrix had bad eyesight and generally used spectacles, but had them not with her when she changed the note. The prisoner was convicted.

There was a similar conviction before Lord *Denman, C. J.*, at the *Essex Lent* Assizes, 1841, in the case of *Regina v. Pindle*.

In *Regina v. Daniel Mathews*, tried before *Parke, B.*, at the *Lent* Assizes for *Kent*, in 1841, the prisoner was indicted for obtaining a watch from *Thomas Allwood*, by falsely pretending that certain articles which he produced were made of gold, and were of the value of 25*l.*; whereas in truth, &c., they were not made of gold. The prisoner was convicted and punished.

recognizance with two sureties for his appearance at the next assizes, is discharged."

"*Sussex Summer Assizes, 1837.*
" *Henry Reed*.—Convicted at the last assizes of a misdemeanor, when a point of law arising judgment was respited. Now Lord *Denman* delivered the opinion of the Judges that the conviction was wrong. Judgment arrested.—Recognizance discharged."

" Said *Henry Reed* pleaded guilty to another indictment for obtaining unlawfully, by false pretences, 18*s.* in money of *William Ellis*, with intent to cheat and defraud him of part thereof, to wit 8*s.* 11*d.*"

(a) 7 Car. & P. 784.

(b) This and the subsequently mentioned cases on the Home Circuit have not been reported, but were supplied to the learned Counsel by Mr. *Straight*, the Clerk of Assize on that Circuit.

All these cases therefore have been decided, in 1856. spite of the objection which is now suggested. The cases seem to support the proposition which has been submitted, that in every case the question, whether the money was advanced upon the false pretence alleged is a question for the jury, and if found by them in the affirmative the prisoner must be convicted. It is singular that the present statute was passed in order to meet the cases of pretences made without a false token passing, it being then admitted that where there was a false token there was a crime; but according to the present objection there is a crime where there is no token, and no crime where there is one.

ROEBUCK'S
Case.

Cur. adv. vult.

The judgment of the Court was delivered on 3rd May, 1856.

LORD CAMPBELL C. J.—In this case which has been standing for judgment some time we are of opinion that, both upon principle and according to the decided cases, the conviction is right.

CRESSWELL J.—I am of opinion that the conviction is right upon the authority of decided cases.

ALDERSON B.—I am of the same opinion; not agreeing with the decided cases, but yielding to their authority.

WIGHTMAN J.—I am of the same opinion as I feel myself bound by the authority of the decided cases upon the question.

LORD CAMPBELL C. J.—*Regina v. Ball* (a) appears to be an authority expressly in point, and I entirely approve of the principle on which that decision may rest. Under such circumstances the party who has

(a) Car. & Marsh. 249.

1856.
 ROEBUCK'S
 Case.

succeeded in defrauding the pawnbroker, the money being advanced upon the faith of the false representation, comes clearly within 7 & 8 *Geo.* 4. c. 29. s. 53.; for, by fraudulently representing as an existing fact that which he knew not to be an existing fact, he obtained the money from the pawnbroker "with intent to defraud him of the same." Having the *animus furandi* he actually steals the money under pretence of a contract of borrowing on pledge; and the statute deprives him of the technical defence that there was not a larcenous asportation. I think it makes no difference that the chain, which has in it no silver, is of "a composition worth about a farthing an ounce." It was in no respect the thing bargained for and it was of no value to the prosecutor. This case cannot properly be distinguished from the cases on "flash notes;" for the paper on which these notes are written or printed is of some value, although infinitesimally small.

Therefore, entertaining the most sincere respect for my learned brothers who have doubted whether the present defendant was properly convicted, I must confess that I have never been able to entertain any doubt upon the subject. At the same time I think it right to say that, although the doctrine seems to me to be untenable that there can be no false pretence within the statute if it be made in the course of a contract, I should have been very loath to concur in the doctrine which was laid down *obiter* in *Rex v. Kenrick* (a) and was acted upon in *Regina v. Abbott* (b); and I should have been inclined to adhere to the decision of *Littledale J.* in *Rex v. Codrington* (c). If the defendant intended by his false representation not to steal the money, but only to get a better bargain or to

(a) 5 Queen's Bench Rep. 49.

(b) 1 Den. C. C. 273.

(c) 1 Car. & P. 661.

1856.
ROEBUCK'S
Case.

obtain an advantage to himself which he would not otherwise have obtained, the other party, having an equivalent, although not of the full value which he was entitled to expect, I should have had great difficulty in saying that this was intended by the statute to be the subject of a criminal prosecution. Such an extension of the penal code, embracing warranties given with a *scienter*, and the extravagant laudation of goods by the seller, against which a cautious buyer might guard himself can hardly be considered to have been the object of the legislature in passing any of the statutes respecting false pretences. It must have been difficult for Judges, in construing those statutes, to lay down a rule which would apply to all fraudulent transactions, showing which are indictable and which the subject only of a civil action; but it might perhaps have been considered a question for the jury whether the defendant, by the false representation, intended to get possession of money, &c. without any equivalent, or only to obtain an unfair advantage in a contract.

At all events the present conviction appears to me to be clearly right.

JERVIS C. J.—I have not thought it necessary to say any thing in this case, because I concur with the rest of the Court to the full length of supporting this conviction. I know that many of my brothers concur in that view, simply because they have felt themselves bound by the authorities. I abstained, the rather from making observations, because as we are confessing that we are bound by authority I thought it not prudent to throw out doubts, by which at the same time we are saying we are bound we should shake the authority of the cases to which we adhere; and further, because as the general result is but the affirmance of the conviction justified by authority, every thing

1856.

ROEBUCK'S
Case.

which is thrown out otherwise is merely conflicting opinion and not to be binding in other cases. I concur with the Court in the result that the conviction should be affirmed.

CROMPTON J.—I do not see any reason to disagree with the judgment which has been pronounced after the decided cases; and I should agree with Lord *Campbell* if the case had found that the chain was of no value; but it is not so stated. I do not disagree with the decision, because it falls within the case of *Regina v. Abbott*.

Conviction affirmed (a).

(a) *Parke B.* had retired from the Bench before this judgment was given.

1856.

REGINA v. WILLIAM GARDNER.

The prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely, the result of the false pretence.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the chairman of the General Quarter Sessions for the county of *Kent*.

At the General Quarter Sessions of the Peace for the county of *Kent*, holden at *Maidstone*, on *Thursday*, the 3rd day of *January*, 1856, before the Right Honourable *Charles*, Earl of *Romney*, *James Espinasse*, and *Henry Shovell Marsham*, Esquires, and others, her Majesty's Justices of the Peace for the said county, *William Gardner* was tried upon an in-

charge, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely, the result of the false pretence.

dictment charging him as follows:—That he did, on the 13th day of *November*, 1855, unlawfully, knowingly and falsely pretend to one *Ellen Henrietta Brunsden*, that the name of him, the said *William Gardner*, was *William Edgar De Lancy*, and that he, the said *William Gardner*, was paymaster of the ship called the *Duke of Wellington*, and that the said ship was then lying at *Portsmouth*, and (the said *William Gardner* being then dressed in naval officer's uniform) that he, the said *William Gardner*, was the son of a half-pay officer, who was living at *Chelsea*, and that his brother was a lieutenant-colonel in the army, by means of which said false pretences the said *William Gardner* did then and there obtain of and from the said *Ellen Henrietta Brunsden* twenty pounds weight of bread, twelve pounds weight of meat, three pounds weight of butter, one pound weight of cheese, three pounds weight of sugar, six quarts of beer, and ten quarts of coffee, and other articles of food, together of the value of thirty shillings, of the goods and chattels of the said *Ellen Henrietta Brunsden*, with intent then and there to cheat and defraud, whereas in truth and in fact the name of the said *William Gardner* was not *William Edgar De Lancy*, and whereas in truth and in fact the said *William Gardner* was not the paymaster of the said ship called the *Duke of Wellington*, nor was the said ship then lying at *Portsmouth*. And whereas in truth and in fact the said *William Gardner* was not the son of a half-pay officer who was residing at *Chelsea*, but was the son of one *William Gardner*, a collector of rates at *Sheerness*; and whereas in truth and in fact the said *William Gardner* had not a brother, who was a lieutenant colonel in the army; against the form of the statute, &c.

1856.

GARDNER'S
Case.

1856.

GARDNER'S
Case.

The evidence on the part of the prosecution, as far as is material for the purpose of this case was, that on the 13th day of *November* last the defendant, wearing the dress of a naval officer, engaged a lodging of *Ellen Henrietta Brunsden* (the prosecutrix) at the rate of ten shillings per week ; that on the 17th day of *November* the defendant expressed himself to prosecutrix as being comfortable, and that he should be likely to remain some time, and stated that he was paymaster of the *Duke of Wellington*, and his name was *De Lancy*, that the defendant continued a lodger till the 25th of *November*, and then expressed a wish to become a boarder, and an arrangement was accordingly entered into that he should become a boarder at a guinea a week, that the prosecutrix supplied the defendant with board, consisting of cooked meat, tea, sugar, bread, butter, cheese and beer, for the six days following, but the defendant did not pay her any thing for the lodging or board.

Upon the case for the prosecution being closed, it was submitted by counsel for the prisoner that the contract for board was a mere addition to the first contract for lodging, and that what the defendant in fact obtained by the false pretences was an alteration of the first contract, and not goods within the meaning of the statute.

The Chairman overruled the objection, and left the case to the jury, who returned a verdict of guilty. Counsel for the prisoner then applied to the Court to reserve the case for the opinion of the Court of Criminal Appeal upon the objection taken, alleging that a case similar to this was then before the Court for decision. The Court thereupon postponed passing sentence on the prisoner, but ordered him to be detained in custody.

The opinion of the Court is requested, whether the objection taken by the prisoner's counsel is valid in law?

1856.

 GARDNER'S
Case.

Romney, Chairman.

This case was argued on 26th *April*, 1856, before JERVIS C. J., COLERIDGE J., CRESSWELL J., ERLE J., and MARTIN B.

Horn appeared for the Crown, and *Ribton* for the prisoner.

Ribton, for the prisoner. The conviction was wrong. It is important to observe the dates. When the false statement was made, neither money, chattel, or valuable security was obtained by it; and obtaining lodging by a false pretence is not an offence within the statute. On the 25th *November*, when the contract to board was obtained no false pretence was made.

COLERIDGE J.—Would it not be a question for the jury, whether there was not a continuing false pretence?

Ribton. To obtain a contract by a false pretence is not within the act. It is not obtaining goods. Here, if any thing besides the lodging was obtained by the false pretence it was not food, but simply a new contract to supply board, and that would not be within the statute. The board might have been supplied, not in consequence of the false pretence made when the contract for the lodging was obtained, but in consequence of the prisoner's manners and conduct after that time, and whilst he was a lodger.

COLERIDGE J.—Yes; but your point is, that there was no evidence to go to the jury, even supposing the interval between the false pretence and the contract had only been an hour.

Ribton. It is quite clear, that to obtain lodging alone would not be within the statute. Here the

1856.
GARDNER'S
Case.

contract is for board and lodging united, and it is doubtful whether in any case obtaining board and lodging would be within the statute. It would always be difficult to separate the two so as to show that the articles of food were obtained by means of the false pretence; but here, at all events, the evidence fails altogether to connect the obtaining of the food with the false pretence.

Horn, for the Crown. It is indisputable law that the intervention of a contract is no answer to a charge of obtaining goods by false pretences if the contract be part of the fraud. Here the prisoner has obtained goods by means of his false pretences, and the fact that the contract was to pay for the board and lodging together does not make it less an obtaining of goods. In *Regina v. Kenrick (a)* the money was obtained upon the sale of horses which the prosecutor was induced to buy by a false pretence.

CRESSWELL J.—That is a remarkable case. Sir *F. Thesiger*, who appeared for the Crown, abandoned the counts for obtaining the money by false pretences.

JERVIS C. J.—That case is now under consideration in *Regina v. Burgon (b)* and *Regina v. Roebuck (c)*.

Horn. The decision in *Regina v. Kenrick* was acted upon and affirmed in *Regina v. Abbott (d)*. Where money was borrowed from the drawer of a bill by the acceptor for the alleged purpose of paying it, and upon a false pretence that he was prepared with the residue, it was held to be within the statute, *Rex v. Crossley (e)*; and so it was held where a baker delivered short weight to the poor, and presented tickets as if he had delivered full weight according to

(a) 5 Queen's Bench Rep. 49.

(b) *Antè*, p. 11.

(c) *Antè*, p. 24.

(d) 1 Den. C. C. 273; 2 Car. & Kir. 630.

(e) 2 Moo. & Rob. 17.

his contract, *Regina v. Eagleton* (a). The decision in *Regina v. Codrington* (b) cannot be considered law unless it can be distinguished from the subsequent cases of *Regina v. Kenrick* and *Regina v. Abbott*, on the ground that the false pretence was not sufficiently proved.

1856.
GARDNER'S
Case.

JERVIS C. J. —The difficulty in the case of contracts is, where the party deceived gets not the consideration which he expects, but something like it.

Horn. In this case the false pretence is clearly proved; it was a continuing pretence, and the prosecutrix acting upon it was eventually induced to supply the prisoner with board as well as lodging. It is objected that lodging is not within the statute. Land is not within the statute; but suppose, by a false pretence, I get an estate and a purse of gold? The articles of food which the prisoner obtained were chattels within the meaning of the statute; and the fact that the prisoner gained lodging as well as board cannot make any difference. The question whether the food was obtained by the false pretence was for the jury, and they have found that it was.

Ribton replied.

Cur. adv. vult.

The judgment of the Court was delivered on 3rd May, 1856, by

JERVIS C. J. —In this case, which was argued before us on *Saturday* last, the Court took time to consider, principally with a view of first taking into consideration the cases of *Regina v. Roebuck* and *Regina v. Burgon*, which have just been disposed of. It was an indictment for obtaining goods under false pretences, the circumstances being, that the prisoner

(a) Dears. C. C. 515.

(b) 1 Car. & P. 661.

1856. represented himself to be the paymaster of the *Duke*
GARDNER'S *of Wellington*, of the name of *De Lancy*, upon which
Case. he made, with the prosecutrix, a contract for board and lodging, at the rate of one guinea a week, and he was lodged and fed as the result of the contract in consequence of the engagement so entered into upon that which was found to be a false pretence; and the question which was submitted to us was, whether it was a false pretence within the statute; or rather whether the conviction was right? That we have considered, and on consideration we are of opinion that the conviction was not right, because we think that the supply of articles, as it was said upon the contract made by reason of the false pretence was too remotely the result of the false pretence in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretences. We therefore think the conviction should be reversed.

Conviction quashed.

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REGINA v. BENJAMIN SCOTT.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by WILLES J.

Benjamin Scott, a bankrupt, was tried and convicted before me at the *Yorkshire* Spring Assizes, 1856, for mutilating one of his trade books on the following count. "The jurors for our Lady the Queen upon their oath present, that heretofore and after the making and coming into operation of a certain Act of Parliament made and passed in a certain Session of Parliament, holden in the twelfth and thirteenth years of the reign of her present Majesty, called 'The Bankrupt Law Consolidation Act, 1849;' and before and at the time of the committing of the offence hereinafter next mentioned, to wit, on the twenty-third day of *November* in the year of our Lord 1855, *Benjamin Scott*, hereinafter mentioned, was a trader liable to become bankrupt within the intent and meaning of the said Act, and of the law then in force relating to bankrupts in *England*; and that he the said *Benjamin*

A bankrupt upon an examination, under section 117 of the Bankrupt Law Consolidation Act (12 & 13 *Vict.* c. 106.), is bound to answer all questions touching matters relating to his trade dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers may criminate himself; and (per Lord

CAMPBELL C. J., ALDERSON B., WILLES J. and BRAMWELL B.;—COLERIDGE J. *dissentiente*), such answers may afterwards be given in evidence against him upon a criminal charge.

In an indictment against a bankrupt, under section 252 of the said statute, for mutilating his books; it was alleged that before and at the time, &c., to wit, on the 23rd *November*, 1855, *B. S.* was a trader liable to become bankrupt within the meaning of the said Act, and that he for more than six months next, immediately preceding the time of filing the petition for adjudication, &c., did reside and carry on business as such trader within the jurisdiction, &c.; and that whilst he so resided, &c., to wit, on the 23rd *November*, 1855, he filed with the registrar, &c., a declaration that he was unable to meet his engagements; and that whilst he so resided, &c., to wit, on the 23rd *November*, 1855, he did present his petition for adjudication. *Held*, after verdict, that the averments in the indictment were sufficient to show that the requirement of the section 16 of the 17 & 18 *Vict.* c. 119. s. 16., as to filing the declaration of insolvency, had been complied with.

1856. *Scott*, for more than six months next, immediately
preceding the time of filing the petition for adjudica-
tion of bankruptcy, hereinafter mentioned in the
Court of Bankruptcy for the *Leeds* district, did reside
and carry on business as such trader as aforesaid, to
wit, as a blanket manufacturer, dealer and chapman
at *Earlsheaton* in the county of *York*, and within the
jurisdiction of the said Court of Bankruptcy for the
Leeds district. And the jurors aforesaid upon their oath
aforesaid do further present that the said *Benjamin
Scott*, so being such trader as aforesaid, and whilst he
so resided and carried on his business as such trader as
aforesaid within the jurisdiction of the said Court of
Bankruptcy for the *Leeds* district afterwards, to wit,
on the twenty-third day of *November* in the year of
our Lord 1855, did file with the Registrar of the said
Court of Bankruptcy for the *Leeds* district, a declara-
tion in writing in the form specified in Schedule D.
annexed to the said Act, which said declaration in
writing was signed by the said *Benjamin Scott* and
attested by an attorney, and by which he did declare
to the said Court of Bankruptcy for the *Leeds* district,
that the said *Benjamin Scott* was then unable to meet
his engagements with his creditors. And the jurors
aforesaid upon their oath aforesaid do further present
that the said *Benjamin Scott*, whilst he so resided and
carried on his said business as such trader as aforesaid
within the jurisdiction of the said Court of Bankruptcy
for the *Leeds* district, afterwards, to wit, on the said
twenty-third day of *November* in the year of our Lord
1855, and within two months from the filing of the
said declaration in writing as aforesaid, did present
his petition for adjudication of bankruptcy against
himself as such trader as aforesaid to the said Court
of Bankruptcy for the *Leeds* district, and by which
said petition he did shew." [It then set out the terms

SCOTT'S
Case.

1856.

SCOTT'S
Case.

of the petition, but did not aver that the petition was attested by the solicitor for the bankrupt. It further alleged the adjudication and other requisites of the bankruptcy, and charged the offence.]

The evidence against him consisted principally of his own examination before the Court of Bankruptcy. The following is a specimen of that examination.

You have stated that the entries as to *Clarkson's* account were in your account books and are now torn out. I now ask you, where are those leaves or what has become of them?

I don't know nothing about the leaves.

That answer is not satisfactory, and if you do not give me a better I shall commit you to *York Castle* until you do answer.

My brother was there at the time, and he saw Mr. *Chambers* tear them out; but I do not know where they were put.

When did your brother tell you they were torn out?

Since the last examination, about a week ago or better.

You just stated you did not know who tore them out.

I don't know only what my brother told me. He said Mr. *Chambers* had torn them out.

I am not satisfied with your answer, and unless you tell me truth as to those leaves, I shall commit you.

I don't know, only they were burnt in the fire.

Who burnt them?

My brother told me Mr. *Chambers* burnt them.

When?

At the time when they were torn out at the *Wheat-sheaf*.

Where is the *Wheat-sheaf*?

It is somewhere in *Briggate*.

1856.

SCOTT'S
Case.

When were they torn out there ?

The very day the books were delivered into the Court, *Monday, 26th October.*

Then how could you use them to make out your balance sheet ?

It was wrong saying so. I told a lie.

The questions put under threat of committal, and the answers to them, related to the bankrupt's trade books. The answers to these questions must have influenced the jury against the prisoner, and tended to cause his conviction.

The admission of the examination in evidence was objected to by the prisoner's counsel, but I allowed it to be read, and reserved the question of its admissibility for the opinion of the Judges.

The defendant's counsel having objected that the count was bad in arrest of judgment, I also reserved that question ; and I have to beg the opinion of the Judges upon the above points.

I postponed the judgment, and held the prisoner to bail meanwhile.

This case was argued on 31st *May*, 1856, before Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., WILLES J. and BRAMWELL B.

Overend Q. C. appeared for the Crown, and *Campbell Foster* (*Riley* with him) for the prisoner.

Campbell Foster, for the prisoner. The examination of the bankrupt was not admissible in evidence against him. The examination was taken after the defendant had made and signed the declaration directed by section 117 of the Bankrupt Law Consolidation Act, 12 & 13 *Vict.* c. 106. (a), which declara-

(a) This section enacts, "That the Court may summon any bankrupt before it, whether such bank-

rupt shall have obtained his certificate or not, and in case he shall not come at the time appointed by

tion is tantamount to an oath, and if taken on oath the examination would have been inadmissible. The statement of a prisoner is not admissible if taken on oath; *Rex v. Britton* (a); and a bankrupt must be in the same position. The statute has not made evidence of this kind admissible against a bankrupt, and therefore the common law principle applies that a man is not bound to criminate himself, and that whatever he says in the nature of admission or confession must be voluntary to be admissible. This examination was compulsory, and the answers were extracted from the defendant under duress, and in fear of temporal injury.

1856.

SCOTT'S
Case.

LORD CAMPBELL C. J.—Where evidence is unlawfully obtained, and the witness objects, no doubt it cannot be admitted; but the question here is, whether it is admissible when the examination is lawful, but compulsory. If the prisoner had not been compelled by the statute to answer I should be clearly in your favour. If he had been committed to prison for not answering the questions put in this case, his liberation could not have been obtained by *habeas corpus*.

ALDERSON B.—How can you say that the bankrupt was by law bound to answer, and yet that he was

the Court (having no lawful impediment made known to and allowed by the Court at such time), it shall be lawful for the Court, by warrant, to authorize and direct any person or persons the Court shall think fit, to apprehend and arrest such bankrupt, and bring him before the Court; and upon the appearance of such bankrupt, or if such bankrupt be present at any sitting of the Court, it shall be lawful for the Court to examine such bankrupt after he shall have made and signed

the declaration contained in the Schedule (W.) to this Act annexed, either by word of mouth or on interrogatories in writing, touching all matters relating to his trade, dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, and to reduce his answers into writing, which examination so reduced into writing the said bankrupt shall sign and subscribe."

(a) 1 Moo. & Rob. 297.

1856.

 SCOTT'S
Case.

under duress, which was illegal? Every oath is a duress, but it is a legal one.

Campbell Foster referred to *Regina v. Sloggett* (a).

COLERIDGE J.—In that case the examination was touching a matter not relating to the trade, dealings or estate of the bankrupt, and the bankrupt did not refuse to answer. It appeared that at a particular part of the examination the bankrupt was told to consider himself in custody, and only such part of his examination as preceded the statement that he was to consider himself in custody was read in evidence against him. The question here is not affected by that case.

LORD CAMPBELL C. J.—Here the examination is not voluntary, but it is legal. The questions put were such as the bankrupt was bound to answer.

COLERIDGE J.—The examination is a legal one, and that is legal for the purposes of the act which otherwise would not be. The question is, whether a proviso that the evidence shall not be used against the bankrupt is to be implied?

Campbell Foster. No doubt he was bound to answer, even though his answers would criminate him; but I contend, that having answered, under compulsion, his evidence, although that compulsion was legal, is not admissible against him on a criminal charge. In 2 *Starkie on Evidence*, p. 27 (3rd edition), it is said, that admissions by a bankrupt, upon an examination before commissioners, are evidence against him, although he might have demurred to the questions, because they might subject him to penalties; but the cases cited in the note do not appear to support this proposition, as they are all cases, not of the examination of a bankrupt, but of a

(a) Dears. C. C. 656.

witness. *Smith and others v. Beadnell (a)* was an action for penalties against a person who had been examined as a witness before commissioners in bankruptcy, and his answers were received in evidence against him in the action; but the ground on which the decision in that case rested was, that the witness might have demurred to answer the questions as subjecting him to penalties, and that, not having thus protected himself, but having answered the questions put to him, his answers might be employed against him for all purposes to which they were legally applicable; but as to the matters relating to his trade and dealings, the bankrupt is bound to answer, and cannot object to do so.

1856.

SCOTT'S
Case.

WILLES J. referred to *Regina v. Wheeler (b)*.

Campbell Foster. There also the prisoner had been examined as a witness, and was not the bankrupt himself; there is no case in which the compulsory examination of a bankrupt has been admitted against him.

In *Rex v. Britton (c)* it was held by *Patteson J.*, after consulting *Alderson B.*, that the balance sheet of a bankrupt, given on oath under his commission, is not admissible against him upon a criminal charge. In all the cases where criminating evidence has been held admissible against the party giving it the answers have been voluntary.

Secondly, the indictment is bad in arrest of judgment.

All the preliminary proceedings in bankruptcy must be averred in the indictment, in order to show that the Court has jurisdiction; *Rex v. Jones (d)*; *Regina v. Lands (e)*. Section 16 of the 17 & 18 Vict.

(a) 1 Camp. 30.

(d) 4 B. & Ad. 345.

(b) 2 Moo. C. C. 45.

(e) Dears. C. C. 567.

(c) 1 Moo. & Rob. 297.

1856.

SCOTT'S
Case.

c. 119. enacts that every declaration of insolvency must be filed "in the Court within the district whereof the trader filing the same shall have resided or carried on business for six calendar months next immediately preceding the time of the filing thereof." There is no averment in this count that the defendant resided or carried on business in the *Leeds* district "for six calendar months immediately preceding the time of the filing" of the declaration of insolvency; and the allegation contained in the count in respect of the filing of the declaration of insolvency is therefore insufficient. Then the indictment purports to set out the petition, but does not aver that it was in the form given in schedule O of the 12 & 13 *Vict.* c. 106., as required by section 89 of that statute, or that it was properly attested.

LORD CAMPBELL C. J.—That surely can only be directory. I do not see any weight in that objection.

Overend Q. C., for the Crown. The form of the count is sufficient after verdict. It is alleged that the bankrupt resided and carried on business in the district for more than six months next immediately preceding the time of filing the petition for adjudication; and then it is averred "that afterwards and whilst he so resided, &c., to wit, on the 23rd *November*, 1855," he filed the declaration of insolvency.

LORD CAMPBELL C. J.—The declaration of insolvency, and the petition, take place usually *uno flatu*.

WILLES J.—It is alleged that it was filed, "to wit, on the 23rd *November*, 1855." If material, is not the day fixed with sufficient certainty?

LORD CAMPBELL C. J.—Giving faith to the day, the requisites of the act are complied with.

ALDERSON B.—Where material matter is laid under a *videlicet*, it must be taken after verdict to have been proved as laid.

Overend Q. C. Then as to the admissibility of the evidence, I contend that the compulsion being legal compulsion, the evidence was admissible, and that the intention of the statute was to deprive the bankrupt of the privilege he would otherwise possess of not being compelled to criminate himself. There is a fallacy in saying that evidence is not admissible if it is compulsory; for all evidence is compulsory; and a party to a suit may be called by the opposite party and compelled to give evidence. In the bribery and other statutes, where the intention of the Legislature was that parties under a compulsory examination should not be liable to have their evidence used against them, an express proviso is inserted to that effect. 6 *Geo.* 4. c. 129. s. 6.; 7 & 8 *Geo.* 4. c. 29. s. 52.; 8 & 9 *Vict.* c. 109. s. 9.; 15 & 16 *Vict.* c. 57. ss. 8, 9, 10.; 17 & 18 *Vict.* c. 38. ss. 5, 6.; 17 & 18 *Vict.* c. 102. s. 35.

1856.

SCOTT'S
Case.

Campbell Foster replied, citing *Rex v. Parratt* (a) and *Rex v. Gilham* (b).

LORD CAMPBELL C. J.—We are all of opinion that the objection to the indictment in arrest of judgment cannot be maintained. The averments are sufficient to show that the requirements of the statute have been complied with. With respect to the main question the Court will consider their judgment.

Cur. adv. vult.

The judgment of the Court (*dissentiente* COLERIDGE J.) was delivered at *Serjeants' Inn Hall*, on 22nd July, 1856, by

LORD CAMPBELL C. J.—This case was argued before my brothers ALDERSON, COLERIDGE, WILLES, BRAMWELL, and myself. The judgment which I will now

(a) 4 Car. & P. 570.

(b) 1 Moo. C. C. 186.

1856. read is concurred in by my brothers ALDERSON,
 SCOTT'S WILLES, and BRAMWELL; my brother COLERIDGE
 Case. differs (a). We are of opinion that the defendant's
 examination before the Court of Bankruptcy was properly
 admitted in evidence by my brother WILLES, and that the
 conviction ought to be confirmed. This examination was
 taken in strict conformity with section 117 of 12 & 13 Vict.
 c. 106., which enacts that the bankrupt may be examined
 by the Court "touching all matters relating to his trade,
 dealings, or estate, or which may tend to disclose any secret
 grant, conveyance or concealment of his lands, tenements,
 goods, money or debts." No objection was made during the
 argument at the bar (and we think that no objection could
 have been made) to the questions which were put to the
 bankrupt or to the obligation upon him to answer those
 questions. They all touched matters relating to his trade,
 dealings, or estate, and tended to disclose concealment of
 his goods, money or debts. If so, we consider it quite clear
 that he was bound to answer them, although by his answers
 he might criminate himself. On referring to *Ex parte*
Cossens (b), and the other cases upon this point, the
 result seems to be that a question cannot be put to a
 bankrupt which does not touch his trade, dealings, or
 estate, or the direct object of which is to show that he
 has committed a criminal act, yet that he cannot refuse
 to answer a question which does touch his trade, dealings,
 or estate, although the answer may tend to show that he
 has concealed his effects, or been guilty of any other
 offence connected with his bankruptcy. This distinction
 accounts for

(a) In a note to *Regina v. Wiley*, 2 Den. C. C. 40, it is stated that the Judges had resolved that whenever the Court of Criminal Appeal

were not unanimous, the case should be brought before the consideration of the whole Bench.

(b) Buck. 540.

the dicta of Lord *Eldon* and other Judges respecting the questions which may be put to a bankrupt: and we think it would be in contravention of the expressed intentions of the Legislature to permit the bankrupt to refuse to answer such questions; for ever since the reign of *Elizabeth* successive statutes have been passed, purporting that to guard against frauds in bankruptcy the bankrupt, when called upon to answer questions respecting his estate and effects, should not be allowed to avail himself of the common law maxim "*nemo tenetur se ipsum accusare.*" There is no physical compulsion to enforce the obligation, and the refusal to answer is not made an offence subjecting the bankrupt to any specific punishment; but the questions, although tending to criminate the bankrupt, are made lawful, and if he refuses to answer them he is liable to be committed and imprisoned as upon a refusal to answer any other lawful question. The present defendant, when before the Court of Bankruptcy, did, after objections properly overruled, answer questions put to him relating to his trade, dealings and estate, which tended to disclose a fraud about concealment of his property. His examination was taken down in writing and signed by him, and we are to determine whether this examination was admissible evidence against the defendant upon an indictment charging him with altering, mutilating, and falsifying his books with intent to defraud his creditors. In *Regina v. Garbett* (a), and in other cases, it has been held that where the defendant has been improperly compelled to answer questions tending to criminate himself, his answers cannot be given in evidence against him; but as the report of *Rex v.*

1856.

 SCOTT'S
Case.

(a) 1 Den. C. C. 236; S. C. 2 Car. & Kir. 474.

1856.

SCOTT'S
Case.

Merceron (a) was said by Lord *Tenterden* (b) not to be correct, we have no decision to guide us as to the admissibility of this examination which was perfectly lawful. Being a genuine document signed by the defendant, *prima facie* it is admissible against him ; and we will consider the several grounds on which the defendant's counsel has argued that it is not admissible. The first is, that the examination of the defendant was taken after making a declaration according to the form in schedule W. of the 12 & 13 *Vict.* c. 106., which is tantamount to an oath, and that if on oath it would have been inadmissible. But in the case referred to in support of this objection, the oath had been improperly administered without authority ; and if the examination is taken under an oath administered by proper authority, there is no reason for saying that it is less likely to be true than if it had been without an oath or any similar solemnity. The next objection is, that the examination was compulsory. It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary ; but this only means that it shall not be induced by improper threats or promises, because, under such circumstances, the party may have been influenced to say what is not true, and the supposed confession cannot be safely acted upon. Such an objection cannot apply to a lawful examination in the course of a judicial proceeding. Then the

(a) 2 Stark. Rep. 366.

(b) According to the report of *Rex v. Mercer*, it was decided by Lord *Tenterden*, when *Abbott J.*, that the evidence which a person had given before a committee of the House of Commons was afterwards admissible against him on a criminal charge ; but upon that

case being cited in *Rex v. Gilham* (1 Moo. C. C. 186), Lord *Tenterden* said : " I think there must be some mistake in that case ; the evidence must have been given without oath, and before a committee of inquiry, where the witness would not be bound to answer."

defendant's counsel objects that, in the course of this examination, threats were used; the alleged threats, however, were merely an explanation of the enactment of the Legislature upon the subject, and a warning to the defendant of the consequences which, in point of law, would arise from his refusing to give a true answer to the questions put to him. Finally, the defendant's counsel relies upon the great maxim of English law "*nemo tenetur se ipsum accusare.*" So undoubtedly says the common law of *England*. But Parliament may take away this privilege, and enact that a party may be bound to accuse himself; that is, that he must answer questions by answering which he may be criminated. This act of Parliament, 12 & 13 *Vict. c. 106.*, creates felonies and misdemeanors, and compels the bankrupt to answer questions which may show that he has been guilty of some of those felonies or misdemeanors. The maxim of the common law therefore has been overruled by the Legislature, and the defendant has been actually compelled to give and has given answers, showing that he is guilty of the misdemeanor with which he is charged. The accusation of himself was an accomplished fact, and at the trial he was not called upon to accuse himself. The maxim relied upon applies to the time when the question is put, not to the use which the prosecutor seeks to make of the answer when the answer has been given. If the party has been unlawfully compelled to answer the question, he shall be protected against any prejudice from the answer thus illegally extorted; but a similar protection cannot be demanded where the question was lawful and the party examined was bound by law to answer it. At the trial the defendant's written examination, signed by himself, was in Court, and the reading of it as evidence against him could be no

1856.

SCOTT'S
Case.

1856.

SCOTT'S
Case.

violation of the maxim relied upon. The only argument, as we conceive, that can plausibly be put for the defendant is, that there is an implied proviso to be subjoined to the 117th section, viz. "that the examination shall not be used as evidence against the bankrupt on any criminal charge." To make it evidence there could be no necessity for any express enactment for that purpose, and an implied proviso appears all that can be contended for. But by this interpolation we may be more likely to defeat than to further the intention of the Legislature. Considering the enormous frauds practised by bankrupts upon their creditors, the object may have been, in an exceptional instance, to allow a procedure in *England* universally allowed in many highly civilized countries. Suppose section 117 had begun with a preamble reciting the frauds of bankrupts, and the importance of having these frauds detected and punished, it would be difficult to say that the Legislature intended that no use should be made of the examination except for civil purposes. When the Legislature compels parties to give evidence accusing themselves, and means to protect them from the consequences of giving such evidence, the course of legislation has been to do so by express enactment, as in 6 *Geo.* 4. c. 129. s. 6. and the five other instances adduced in the argument on behalf of the prosecution. We therefore think we are bound to suppose that in this instance, in which no such protection is provided, it was the intention of the Legislature to compel the bankrupt to answer interrogatories respecting his dealings and conduct as a trader, although he might thereby accuse himself and to permit his answers to be used against him for criminal as well as civil purposes.

COLERIDGE J.—I have the misfortune in this case to differ from the rest of the Court ; and entertaining

unfeignedly a great distrust of my own opinion I should gladly surrender it to theirs, if I could divest myself of the belief that the judgment, which I venture to think erroneous, goes also to impair a maxim of our law as settled, as important and as wise as almost any other in it; and, consequently, that it is a duty to enter my protest, however ineffectually, against it. The maxim to which I allude will, of course, be understood to be that which is familiar to all lawyers,—that no person can be compelled to criminate himself. It would be a wasting of time to support this maxim by authorities or to dwell upon its importance. The judgment from which I differ does not proceed upon a denial or disparagement of it; but on some such argument as this—every lawful examination of a party charged, conducted according to law, is admissible evidence against him; this examination was lawful by statute and has been lawfully conducted; therefore this examination is admissible evidence against the prisoner. Now I deny the major premise of this syllogism. I say that it is not true in the general and unqualified way in which it is stated. I say that an examination may be lawful for certain purposes and be lawfully conducted with these purposes in view; and yet not be admissible in evidence against the party charged when upon his trial on a criminal charge, even if that charge be founded on the matters before lawfully inquired into. We have here on the one hand an undisputed and indisputable maxim of the common law that no man shall be bound to accuse himself; on the other we have a statute not in terms professing to abrogate this maxim, but authorizing commissioners of bankrupts to examine a bankrupt “touching all matters relating to concealment of his lands, tenements, goods, money or debts;” and subjecting

1856.

SCOTT'S
Case.

1856.

SCOTT'S
Case.

him to imprisonment indefinitely, without bail, if he refuse to answer. The same statute makes it a felony, punishable with transportation for life, for a bankrupt to conceal any part of his real or personal estate to the value of 10*l.*, with intent to defraud his creditors. How, then, upon general principles, are we to proceed in a seeming conflict between the common law and these provisions of the statute? Not, I apprehend, by assuming at once that there is a real conflict, and sacrificing the common law; but by carefully examining whether the two may not be reconciled, and full effect be given to both; and for this purpose it is most material to ascertain with what intent, and for what object, the bankrupt is compellable to undergo this examination, and to answer the questions put. If, for example, it should appear that he was to be examined with a view of procuring evidence against him on a criminal charge, instituted, or to be instituted, whatever one might think of the justice of such an enactment it would be idle to contend that it had not abrogated *pro tanto* the common law. If, on the other hand, it should be clear that the examination was authorized solely for the better discovery of the bankrupt's estate, and the bringing it into distribution amongst his creditors—that it would be unlawful to examine him for any other purpose—that he might lawfully refuse to answer any question put merely for the purpose of extracting evidence against him on a criminal charge, then I conceive that you would be far advanced on your way to a conclusion which will prevent the statute from breaking in upon the common law. Then I think the Judge who is trying the prisoner ought to say, the examination which could not have been instituted for the purpose of procuring evidence against the prisoner must not be used as evidence against him now—that which cannot be done

directly must not be done indirectly—the answer which the prisoner could not have been compelled to give, if the question had been put in order to use that answer to-day, must not be used to-day though the question was not so put, but ostensibly on a ground which prevented him from then demurring to answer it. The examination was lawful only for a special purpose and in derogation of the common law and the principles of justice; it is a fraud upon that common law and those principles which no Court will lend itself to, even if the examination were *bonâ fide* instituted for the prescribed purposes, to use the answers afterwards for a totally different and in itself unlawful purpose. Now I suppose it will not be denied that the bankrupt's examination is purely what I have here supposed—for the purposes of getting at his estate, and ascertaining his dealings, so far as may be necessary for regulating the decision of the commissioners as to his certificate. Beyond these limits they cannot travel; within them they are not directly criminal judges, nor ancillary to those who are. They may examine the bankrupt, and he can only refuse to answer on peril of imprisonment as to all matters touching his property; and in so doing it will be scarcely possible, or impossible in a vast number of cases, not to elicit evidence which may tend to criminate him; but then he is not before a criminal court, nor on his trial for any of the offences which he so discloses incidentally. He does not need the protection of the common law there, and nothing in the statute expressly takes that away, or shows that it was intended to deprive him of the benefit of it elsewhere. The two cases that have been mentioned by my Lord, illustrate the principle for which I contend, and they show the clear opinion of Lord *Eldon* and Lord *Lyndhurst* that the stringent

1856.

SCOTT'S
Case.

1856.
SCOTT'S
Case.

powers of the commissioners could not be allowed to violate what the former called "one of the most sacred principles in the law of this country," that no man can be called on to criminate himself if he choose to object to it. In the case of *Ex parte Cossens*, a petition was addressed to Lord *Eldon*, praying that the petitioners might be allowed to examine a bankrupt fully, touching his estate and effects, and "particularly whether he, or any one in trust for him or for his benefit, has received, or is to receive, any sum or sums of money or other valuable consideration for having resigned, or as an inducement to resign, the office of town-clerk of the city of *Bristol*." He dismissed the petition, and in the course of a very valuable judgment he drew the line clearly and distinctly, upholding the power to inquire into all receipts of money or securities which could be available to increase the estate; but when the question came to this, "Did you, through an illegal act, acquire either the one or the other?" he says he should have told the bankrupt, as every Judge in the country he says used to do, that he was not bound to answer. Suppose then a bankrupt, having had the question put to him and demurred to it, had been compelled to answer, is it to be believed that Lord *Eldon* would have received the answer to prove the case for the prosecution of the bankrupt for the offence so disclosed? In *Ex parte Kirby (a)* a bankrupt demurred to a question "because it might expose him to a criminal prosecution." The commissioners overruled the objection and committed him. He came up on *habeas corpus*. The case was argued at great length, and very learnedly and ably, by Mr. *Collinson* and Mr. *Rose*. The former

(a) 1 Mont. & M'Ar. 225.

went through all the cases, and they were fully discussed between him and Lord *Lyndhurst*, who finally discharged the bankrupt. He said—"It is by no means clear that the inquiry would be beneficial to the bankrupt's estate; but even if it was likely to prove advantageous, there is not any authority to show that the commissioners may dispense with the general rule of law, that no person can be compelled to criminate himself." These cases go very far to show that even before the commissioners the statutes do not intend to destroy the common law maxim; but the present case is *à fortiori* to these. I admit that it must be very often difficult for the commissioners to draw the line, for it is clear that the bankrupt must answer as to all circumstances respecting his property, and the facts he so discloses may raise inferences against him; he must answer or abide the consequences. But the difficulty would be incalculably lessened and the law much more effectually administered as regards the estate, if you confine the examination to its legitimate object, and not examine the bankrupt with the terror of making evidence against himself at the *Old Bailey* in the answers he gives. It must not be supposed that this is a new question arising in respect of any new powers conferred by the Bankrupt Law Consolidation Act. Under the 5 *Geo. 2. c. 30.*, concealment by a bankrupt to the amount of 20*l.* was felony, without benefit of clergy, and the commissioners had the same power of examining him. Was a capital conviction ever heard of, or could it have been tolerated, on evidence so extorted from the prisoner himself? It is a question too of wider extent than may seem at first sight; not merely as it regards the bankrupt may it arise, but also as regards his wife or any witness who has had dealings with him. All and each of these may be examined as to matters which may

1856.

 SCOTT'S
Case.

1856.
SCOTT'S
Case.

implicate them in some criminal transaction—subject them to some criminal charge. They cannot refuse to answer if the questions relate to the bankrupt's estate; and the rule which the Court is about to lay down must equally apply to them. It is something I think, to be considered, that with the bankrupt law substantially in its present state for centuries, the question now for decision has never come to be decided before. If examinations have not been tendered in evidence it is intelligible; but why have they not been? After the decision of this Court there is no hazard in predicting that a short mode will be found of proving cases against bankrupts; and be it observed a different mode from that in which offences are proved against other criminals. And how will the proof be procured? I wish to make no reflection against commissioners in bankruptcy, men admirable many of them for the zeal, learning, and integrity with which they discharge very important and sometimes very difficult duties; but I object to the evidence for the prosecution being made up by this new and un-English mode, the compulsory cross-examination of the prisoner apart from the judge and jury who are to try him, he very often wholly unprotected even under the presidency of a commissioner. Even so, it seems to me highly objectionable; but what if there be no commissioner? Since the reservation of the present case, I had to try a bankrupt for mutilation of his books. His examination was tendered in evidence. I said I should receive it and reserve the points; but I was desirous of some preliminary inquiry and it turned out that the persons present were the assignee's solicitor, his clerk, and the bankrupt. The commissioner's chair was there, but it was empty. This was not proper, but it was tolerable if the only object was to ascertain from the bankrupt where his property was

to be found. It was intolerable, and I am certain no commissioner would have been found guilty of such neglect of duty, if it had been considered that the purpose or the result of the meeting had been or might be to extract evidence upon which alone, a few years ago, the bankrupt might have been hung—on which he now may be transported for life. The exposure and punishment of fraud may be purchased too dearly. I think they are, if in order to arrive at them we break down what I venture to call, after Lord *Eldon*, a sacred principle of our law. No doubt the statute must be obeyed. I do not seek to evade it—it is a wise statute if you confine it to the objects for which it was made; and it may be, in my opinion, strictly obeyed within those limits and no violence be done to the common law. I regret the great length to which my remarks have run; it had unfortunately escaped me, that judgment was to be given this morning, and I have really not had the time I could have wished properly to arrange or compress them. In my opinion the bankrupt's examination was not admissible.

ALDERSON B.—I have nothing to say to what has fallen from my brother COLERIDGE but this—that my judgment proceeds upon the ground, that if you make a thing lawful to be done, it is lawful in all its consequences; and one of its consequences is, that what may be stated by a person in a lawful examination, may be received in evidence against him. That is quite settled and conformable to a most important maxim of English law.

Conviction affirmed.

1856.

SCOTT'S
Case.

8 Cross 165 note

1856.

REGINA v. JOHN CROSS and JAMES
LEYLAND.

The compulsory examination of a bankrupt under section 117 of the Bankrupt Law Consolidation Act (12 & 13 Vict. c. 106.) is admissible in evidence against him on a criminal charge.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal, by Mr. Baron MARTIN.

The prisoners were tried before me at the *Liverpool* Spring Assizes, 1856, for a conspiracy to defeat the remedies of the rightful creditors of the prisoner *John Cross*, by means of a judgment against him and execution thereon in the Court of Common Pleas at *Lancaster*, under which his goods were seized, the alleged debt for which the judgment was given being fictitious. *John Cross* was duly made bankrupt, and examined in the ordinary way before the Commissioner at *Manchester*. His examination was offered in evidence against him. It was objected to by his counsel, who stated that Mr. Justice WILLES had admitted similar evidence at *York*, but reserved the question of its admissibility for the opinion of the Court of Criminal Appeal. I stated I would follow the same course, and the examination was read. The prisoners were convicted and sentenced to imprisonment. If in the case to be stated by Mr. Justice WILLES, the Court of Criminal Appeal should be of opinion that such an examination is not admissible in evidence (the examination being the ordinary one under the Bankrupt Act, and the answers given without any threat or compulsion beyond the compulsion or duty which the Bankrupt Act imposes), I request that the Court may order that the judgment be annulled, and that the prisoners be discharged.

SAMUEL MARTIN,
14th April, 1856.

This case came on to be argued 3rd *May*, 1856, before JERVIS C. J., COLERIDGE J., WIGHTMAN J., CRESSWELL J. and MARTIN B. 1856.

CROSS'S
Case.

Wheeler appeared for the prisoner; no counsel appeared for the Crown.

Wheeler, for the prisoner, contended that the examination was not admissible in evidence against the bankrupt, on the ground that it was an examination taken under the power and for the purposes of the Bankrupt Law Consolidation Act, 1849, and therefore not voluntary.

It however appeared that no copy of the examination was annexed to the case, or had been returned to the Court; and their Lordships therefore ordered that the further hearing of the case should be adjourned until the Court should have been furnished with a copy of such examination.

The case was subsequently amended by the following copy of the examination of the prisoner *Cross* being annexed thereto.

“The Bankrupt Law Consolidation Act.

“In her Majesty’s Court of Bankruptcy at *Manchester*,

“The fifth day of *February*, 1856,

“I, *John Cross*, of *Bolton Le Moors*, in the county of *Lancaster*, innkeeper, the person declared a bankrupt under a petition for adjudication of bankruptcy, filed on the 16th day of *January*, 1856, do solemnly promise and declare that I will make true answer to all such questions as may be proposed to me respecting all the property of me the said *John Cross*, and all dealings and transactions relating thereto, and will make a full and true disclosure of all that has been done with the said property to the best of my knowledge, information and belief.

(Signed) “*John Cross*.”

“The said *John Cross* having, on the day and year

1856.

 CROSS'S
Case.

and at the place abovementioned duly made, signed, and subscribed the solemn promise and declaration required by law to be made, signed, and subscribed by bankrupts in lieu of an oath before me *Nicholas Simons*, Esq., Registrar, acting for *William Thomas Jemmett*, Esq., with his consent in writing, he being one of the Commissioners of Her Majesty's Court of Bankruptcy, acting in the prosecution of the said petition for adjudication of bankruptcy, I proceeded to examine him touching the discovery of his estate and effects, and on the following questions being put and propounded to him the said *John Cross*, he gave the several answers hereto respectively following each question, that is to say,

“ Q. Do you know *William Ramsden*, of *Bolton*, butcher? A. Yes, sir. Q. Did he ever lend you any money? A. No. Q. Did you ever give him a promissory note for 70*l.* or any other amount? A. I don't know; if I did, I've forgot. Q. Did you, or did you not? A. Well, I cannot remember doing it. Q. Did he not serve you with a writ in the month of *December* last for 70*l.*? A. Yes. I got a writ from *Ramsden*; this is it now produced. Q. Who served you with it? A. I don't know. I cannot speak to it. Q. Was it somebody from *Preston*? A. I don't know. There was somebody from *Preston* left a paper with my Missus. Q. When was it left? A. Sometime beginning of this year. Q. Did *Ramsden* ever apply to you for money before you got the writ? A. No. Q. Did you ever enter an appearance to that writ? A. No. Q. Did the sheriff's officer take possession under that writ for *Ramsden's* debt? A. Yes. A sheriff's bailiff of the name of *Massey* came from *Preston*, and took possession. Q. Why did you not enter an appearance to the writ if you owed *Ramsden* no money? A. I did not know that I had any occasion. Q. Did *Ramsden* come to your house whilst *Massey*

was in possession? A. No, I never saw him. Q. Was this placard issued to sell up for *Ramsden*, the placard having *Thomas Massey* at the foot, and marked B.? A. Yes. Q. At the time when that sale was to have taken place had you received a summons from the Bankruptcy Court in respect of a debt of 158*l.* 14*s.* you owed to Messrs. *Moxon* and Sons? A. Yes. Q. When you say that you did not know that you had any occasion to enter an appearance, had you never had a writ before? A. Yes, about eighteen months before, but I cannot speak exactly to the time. Q. Did you enter an appearance to that? A. Yes, I gave orders to you to do it. Q. Then why did you not, if you owed *Ramsden* no money, do the same? A. I thought there was no occasion. Q. Do you know *John Murphy*, of *Bolton*, agent and debt collector? A. Yes. Q. Have you consulted him about your affairs? A. No. Q. Whom did you consult about your affairs? A. *Farnworth*, a sheriff's officer, at *Preston*. Q. Was that before you got *Ramsden's* writ? A. Yes. Q. How long before you got *Ramsden's* writ? A. A few days. Q. Through whom did you become acquainted with Mr. *Farnworth*? A. Through *James Leyland*, telling me he was a likely man to make my affairs right. Q. Where did you have an interview with *Farnworth*? A. At his house at *Preston*. Q. Who took you to *Farnworth*? A. *James Leyland* took me there. I had never seen him before. Q. What did *Farnworth* advise you to do? A. *Farnworth* advised me to have a sale, put the money in my pocket, and then offer the creditors as much as I could pay them. Q. Was *Ramsden's* name mentioned at the time you were with *Leyland* at *Farnworth's* of *Preston*? A. I cannot say it was. Q. When did you consult *Leyland* about your affairs, which made him go with you to *Preston*? A. About six weeks or so before New Year's Day last.

1856.

CROSS'S
Case.

1856.

CROSS'S
Case.

Q. Were you in difficulties at that time? A. Yes.
Q. What did *Leyland* advise you to do? A. He advised me to have a sale, put the money in my pocket, and pay the creditors as far as it went. Q. What was the final arrangement made between you and *Farnworth*, after you had consulted him along with *Leyland*? A. It was agreed that he was to sell, and his man *Massey* afterwards came in. Q. Did you or *Leyland* pay *Farnworth* any money? A. Yes. *Leyland* did. Q. How much? A. Five pounds first, and five pounds afterwards, and the last six pounds, something altogether about seventeen pounds. Q. Whose money was that? A. It was mine. I found it to pay *Farnworth*. Q. What for doing? A. For these friendly writs. Q. What friendly writs? A. *Ramsden's* and *John Lowe*, tailor, of *Bolton*. Q. Did you owe *John Lowe* anything? A. No. Q. How much was *John Lowe's* writ for? A. Twenty pounds odd. Q. Who mentioned *Ramsden's* and *Lowe's* names to you? A. I cannot speak to that. Q. How long had you known *Ramsden* and *Lowe*? A. A good many years. Q. Were you in the habit of attending foot races? A. Yes, I've been to many a one. Q. Did *Ramsden*, *Lowe* and *Leyland* use to go with you? A. *Ramsden* and *Lowe* never went with me, but *Leyland* has been many a time. Q. What was the name of the attorney who issued the writs? A. It was Mr. *Stanley*, of *Preston*. Q. Did you ever see Mr. *Stanley*? A. Yes, once when I was at *Farnworth's* house he came in. Q. Had you sent for him? A. No. Q. What took place when *Stanley* came in? A. I don't know. *Farnworth* and he were talking together at the opposite side of the room. Q. How did *Farnworth* know that *Ramsden* and *Lowe's* names were to be used in the friendly writs? A. I don't know. I am sure I did not tell him. Q. Was *Leyland* with you at this time? A. Yes; he went in the

first train on *Sunday* morning, and I went by the twenty minutes past two in the afternoon of the same day. Q. Did the interview between you and *Stanley* and *Leyland* and *Farnworth* take place on the *Sunday*? A. Yes. Q. When you got to *Preston* whom did you first see? A. I saw *Leyland*, he met me at the train, and in an hour or so afterwards he took me to *Farnworth's*. Q. Who was to sell under this posting bill marked B, before referred to? A. *Farnworth* the sheriff's officer. Q. Did *Farnworth* come over on *Friday*, the 18th of *January* last, to sell? A. Yes. Q. Did he sell? A. No; I told him the Bankrupt Court was in possession. Q. How long had *Massey*, *Farnworth's* man, been in possession up to the 18th *January*? A. I believe he came on the *Monday* before. Q. How long before this had you had any malt from Messrs. *Moxons*, of *Pontefract*, your creditors? A. About four months. Q. Did you brew that malt? A. Yes, all but two loads, which I sold to the landlord of the *White Lion*; he was without, waiting for some he had ordered. Q. What did you sell him that at? A. I sold it him at 53s. a load; at this time I had not got Messrs. *Moxon's* invoice, and I agreed with him he was to pay me invoice price in the event of its being more. Q. Did you sell anybody else any, either malt or hops, about this time? A. I cannot say, but to the best of my belief I did not. Q. Did you never sign a promissory note to *William Ramsden* which *John Ball*, fishmonger, witnessed? A. No, I don't believe I ever did. Q. Did not *Massey* and *Farnworth* both give up possession of your house on the 18th? A. Yes, on the same morning. Q. To whom did *Massey* give the keys of the wine cellar, spirit cellar, and ale cellar? A. I believe he gave them to *Farnworth*.

1856.

 CROSS'S
Case.

“JOHN CROSS.”

The case, as amended, was set down for argument

1856. on the 31st *May*, 1856, when the Judges present were Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., WILLES J. and BRAMWELL B., before whom the case of *Regina v. Scott* (a) was on that day argued ; but on this case being mentioned,

CROSS'S
Case.

MARTIN B. said that when he reserved the question in this case at *Liverpool*, he did so because it was stated to him that a case had been reserved by WILLES J. on a similar point at *York*. His understanding in the matter was, that there was to be no argument on this case, but that it was to be governed by the decision, whatever that might be, of the case first reserved by WILLES J. The prisoner's counsel was therefore not heard.

On the 22nd *July*, 1856, the judgment of the Court in *Regina v. Scott* (b) was given in *Serjeants' Inn Hall*, affirming the conviction ; and the conviction in this case was also affirmed.

Conviction affirmed.

(a) *Antè*, p. 47.

(b) *Antè*, p. 55.

1856.

REGINA v. THE INHABITANTS OF THE TOWNSHIP OF GATE FULFORD.

Gate Fulford
and *Water*
Fulford were
townships
in the parish
of *Fulford*

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by CRESSWELL J.

Ambo ; and the whole of *Gate Fulford* and part of *Water Fulford* constituted the manor of *Fulford*. The township of *Gate Fulford* was indicted for non-repair of a road ; and the indictment charged the liability as resulting from an Inclosure Act and an award. The Inclosure Act directed that commissioners by award should divide and allot certain lands in the manor of *Fulford*, which (it was contended) were shown by the context to be all in the township of *Gate Fulford*, and should set out the public and private roads in the lands to be divided and allotted ; and that the public roads so set out should be repaired by the township of *Gate Fulford*.

The award set out some roads which it termed public highways and roads, some which termed public carriage roads, and others which it termed private carriage roads. It

This was an indictment against the inhabitants of the township of *Gate Fulford*, in the county of *York*, for the non-repair of a highway. It came on to be tried before the Honourable Mr. Justice CRESSWELL, at the Spring Assizes for the said county, held at *York*, on the 7th day of *March*, 1855, when a verdict was entered for the Crown on the three first counts, the two last being abandoned, subject to the following case reserved for the opinion of the Court of Criminal Appeal.

The indictment contained five counts; the fourth and fifth counts were abandoned at the trial, and no question arises upon them (*a*).

(*a*) The first count was as follows :—

County of *York*, } The jurors for
to wit. } our lady the
Queen upon their oath present
that before the day of the taking
of this inquisition by a certain Act
of Parliament made in the thirtieth
year of the reign of his late Majesty
King *George* the Second “For di-
viding and enclosing certain fields
meadows and commons in the
manor of *Fulford* in the county of
York” the said manor of *Fulford*
then and still being in the *East*
Riding of the county of *York* afore-

said. It was amongst other things
enacted that *Robert Bewlay Richard*
Mason and *Samuel Milbourn* therein
described should be and they were
thereby nominated and appointed
commissioners for the dividing and
allotting the common fields ings
and commons in the said Act men-
tioned and for the executing the
several other powers thereafter
mentioned and for that purpose
they the said commissioners or the
major part of them should within
twelve calendar months thence next

from the award, that the road in question was made a public road.

The road in question ran through what was now understood to be the township of *Water Fulford*. Evidence was given that the township of *Gate Fulford* had, on various occasions, repaired the road, but had also repaired roads in the township which were not public roads.

Held that, assuming it to be true (as was contended) that the commissioners had power to award only as to lands in *Gate Fulford*, the Court would presume that the lands on which the road was constructed lay, at the time of making the award, in *Gate Fulford*, the evidence being that from which a jury, if they had been asked the question, might have inferred this.

Agreed that, if it had appeared that the road so set out had, as to any part, been on land over which the power of the commissioners did not extend, the award would have been bad as to the whole road.

1856.

GATE
FULFORD
Case.

then set out the road in question, which it termed a “carriage road” simply, and directed that it should be repaired by the inhabitants of “the township of *Fulford* aforesaid,” without specifying which township was meant. Another road, also termed simply a “carriage road,” appeared to be set out as a private road.

Held that, as against the township, it sufficiently appeared,

On the argument of a case before the Court of Criminal Appeal the counsel for the defendant must begin.

1856.

 GATE
FULFORD
Case.

To this indictment the defendants pleaded not guilty.
At the trial the counsel for the prosecution put in evi-

ensuing cause a true and perfect survey and admeasurement to be made by such person or persons as they, or the major part of them should think fit of the said common fields ings and commons or waste grounds so intended to be divided as aforesaid and after such survey and admeasurement so made should set out divide apportion and allot the same respectively in the manner thereafter mentioned. And it was in and by the said Act amongst other things provided that the said commissioners or the major part of them should have power to set out one statute acre of land or so much more as they should think necessary in some part or parts of the said common fields or either of them for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for repairing the highways in the township of *Gate Fulford* in the said Act mentioned. And it was thereby further enacted that the said commissioners or the major part of them should have power to set out all such public and private ways and roads and ditches fences drains bridges gates and stiles as they should think necessary or convenient in over and upon the lands so intended by the said Act to be divided and allotted (so as all such public highways so to be set out should be of the breadth of forty feet at least between and exclusive of the ditches) and to order and appoint by whom and in what manner all the said roads and ways ditches fences drains bridges gates and stiles should respectively be made and thereafter from time to time re-

paired maintained and kept in repair and in the said Act it was provided that all such public and common highways when so set out and made as aforesaid should from time to time be repaired and kept in repair by the inhabitants of the township of *Gate Fulford* in the county of *York*. And that after such ways and roads should be so set out and made it should not be lawful for any person or persons in any manner whatsoever to use any other public or private way or road in or over the said lands so to be divided and allotted or any of them. And it was thereby further enacted that the said commissioners or the major part of them should within two years after such survey and admeasurement should be made as aforesaid make or cause to be made an award or instrument in writing in which they should express the several things in the said Act more particularly mentioned and which said award should contain amongst other things proper orders and directions concerning such public and private roads and ways and concerning the fences ditches drains bridges gates and stiles in over and upon the said lands so intended to be divided and inclosed as aforesaid together with all such other orders and directions as they the said commissioners or the major part of them should think necessary or proper for the perfecting and completing the said intended division and inclosure. And that such award or instrument should be fairly ingrossed upon parchment and sealed and delivered by the said commissioners or the major part of them

dence, and proved the Act of Parliament and award referred to in the indictment. The award which bears

1856.

GATE
FULFORD
Case.

and then inrolled at length in the public register office for registering deeds in the east riding of the said county of *York* and the register of the said east riding or his deputy was thereby required to inrol the said award amongst the inrolments of bargains and sales of lands in the same riding and the jurors aforesaid upon their oath aforesaid further present. That after the making and passing of the said Act the said commissioners took upon them the execution of the powers and authorities so vested in them by the said Act as aforesaid and thereupon within the said period of twelve calendar months made or caused to be made a true and perfect survey and admeasurement of the said common fields ings and commons or waste grounds so intended to be divided pursuant to the said Act and after such survey and admeasurement having been so made or caused to be made did set out divide apportion and allot the same common fields ings and commons or waste grounds respectively in the manner in the said Act mentioned and directed and amongst other things did set out divide apportion and allot one acre of land in a certain part of the said common fields so intended to be divided and allotted as aforesaid for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for the purpose in the said Act mentioned. And did also set out such public and private ways and roads and bridges as they thought necessary or convenient in over and upon the lands so by the said Act intended to be

divided and allotted as aforesaid and amongst others the public way or road and bridge respectively hereinafter particularly mentioned and alleged to be out of repair and executed to the best of their judgment the several other powers vested in them by the said Act. And the jurors aforesaid upon their oath aforesaid further present that after the making and passing of the said Act and after the said commissioners had taken upon them the execution of the powers and authorities so vested in them in and by the said Act as aforesaid and within two years to wit immediately after making such survey and admeasurement as aforesaid and after completing such division and allotment and after executing to the best of their judgment the several other powers vested in them by the said Act to wit on the tenth day of *October* in the year of our Lord one thousand seven hundred and fifty nine. The major part of the said commissioners to wit the said *Robert Bewlay* and the said *Richard Mason* did make or cause to be made an award or instrument in writing in which they did express the several matters and things in the said Act in that behalf mentioned and which said award or instrument in writing so made as aforesaid did contain proper orders and directions concerning such public and private roads and ways and concerning the fences ditches drains bridges gates and stiles in over and upon the said lands so by the said Act intended to be divided and inclosed as aforesaid together with all such other orders and directions as they the

1856.

 GATE
FULFORD
Case.

date the 10th day of *October*, 1759, was duly made, engrossed, and inrolled according to the provisions of

major part of the said commissioners thought necessary or proper for the perfecting and completing the said division and inclosure according to the true intent and meaning of the said Act and the said award or instrument was fairly engrossed upon parchment and sealed and delivered by the major part of the said commissioners to wit by the said *Robert Bewlay* and *Richard Mason* and was then to wit on the eighteenth day of *July* one thousand seven hundred and sixty three inrolled at full length by the then registrar or his deputy in the public register office for registering deeds in the east riding of the said county of *York* as was by the said Act directed in that behalf. And the jurors aforesaid upon their oath aforesaid further present that the said commissioners by their said award amongst other allotments by them therein made of the said common fields ings and commons or waste grounds by the said Act intended to be divided and allotted as aforesaid did thereby allot and award one acre of land by certain abutments and boundaries in the said award mentioned and as the same was then staked out and they the said commissioners did thereby award that the said one acre so by them set out as aforesaid should be to and for the common use of the proprietors of the said common fields to supply them from time to time with gravel or sand for repairing the highways in the said township of *Gate Fulford* as by the said award reference being thereunto had will more fully and at large appear which said one acre was so set out allotted and awarded in a

certain part of the said common fields by the said Act intended to be divided and allotted as aforesaid and by reason of the premises and by force of the said Act and by virtue of the said award so in pursuance thereof by the said commissioners made as aforesaid thereupon was and from thence continually hath been and still is held and enjoyed to and for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for repairing the highways in the said township of *Gate Fulford*. And the jurors aforesaid upon their oath aforesaid further present that the said commissioners by their said award amongst several public and private ways and roads made and by them therein set out and appointed and which they thereby adjudged to be necessary and convenient to be made in over and upon the said lands intended to be divided and allotted as aforesaid did order and award that there should be one carriage road branching out of the last thereinbefore mentioned road (and which said last thereinbefore mentioned road) is in the said award described to be and is a public carriage road leading from the south end of *Fulford* aforesaid to *Selby* in the east riding aforesaid and is part of a common Queen's highway leading from the city of *York* over the said townships of *Water Fulford* and *Gate Fulford* and certain other townships to *Selby* in the said county and which said first abovementioned carriage road so awarded as aforesaid is described in the said award as leading to *Water Fulford* aforesaid

the said act, and all things necessary to give validity to it were done and performed. Copies of the mate-

1856.

GATE
FULFORD
Case.

and a certain landing place in the said award mentioned that is to say the landing place adjoining a certain public navigable river called the *Ouse* and the said commissioners did thereby further order and award that there should be one carriage bridge over the water sewer across the said road so set out as lastly aforesaid and in the said award more particularly described and the said commissioners did thereby further order and award that the said road and bridge should be made and from time to time kept in repair by the inhabitants of *Gate Fulford* aforesaid in the said award called the township of *Fulford* aforesaid as by the said award reference being thereunto had will more fully and at large appear which said carriage road so set out ordered and awarded by the said commissioners as hereinbefore mentioned was then and there to wit in over and upon the said lands so intended to be divided and allotted as aforesaid of the breadth of forty feet at the least to wit of the breadth of forty feet between and exclusive of the ditches and was so set out as aforesaid in over and upon the said lands by the said Act intended to be divided and allotted as aforesaid and by reason of the premises then and there became and was and from thenceforth continually hath been and still is a common public highway used for all the liege subjects of our lady the now Queen and her predecessors to go return pass and repass on foot and on horseback and with cattle carts and carriages at their will and pleasure and to be amended and

repaired at the general expense of the inhabitants of the said township of *Gate Fulford*. And the jurors aforesaid upon their oath aforesaid further say that the whole of the said carriage road so set out ordered and awarded as aforesaid for the length of divers to wit three hundred yards and in breadth divers to wit forty feet after the same had been so set out ordered and awarded as aforesaid and after the making and inrolment of the said award of the said commissioners in manner and form aforesaid and after the said carriage road had been completed and made to wit on the first day of *January* in the year of our Lord one thousand eight hundred and fifty four and from thence continually afterwards until the day of the taking of this inquisition in the township of *Water Fulford* aforesaid in the county aforesaid was and yet is very ruinous miry deep broken and in great decay for want of due reparation and amendment of the same so that the Queen's subjects through the same way with their horses coaches carts and waggons could not during the time aforesaid nor yet can go return pass ride and labour without great danger of their lives and the loss of their goods to the great damage and common nuisance of all the Queen's liege subjects through the same way going returning passing riding and labouring and against the form of the Act of Parliament aforesaid and against the peace of our said lady the Queen her crown and dignity and that the inhabitants of the said township of *Gate Fulford* aforesaid the said carriage

1856.

GATE
FULFORD
Case.

rial parts of the said act and award accompany this case, and are to be treated as part of it, but if neces-

road so ordered and awarded as aforesaid so as aforesaid being in decay by reason of the premises and by force of the said Act and by virtue of the said award so in pursuance thereof by the said commissioners made as aforesaid ought during the time last aforesaid to have repaired and amended and still of right ought to repair and amend the said highway so being in decay as aforesaid when and so often as it hath been and shall be necessary.

The second and third counts were precisely the same as the first except that instead of describing the road as being in the township of *Water Fulford* in the county of *York* the second count described it as being in the parish of *Gate Fulford* in the county aforesaid and the third count described it as being in the township of *Gate Fulford* in the county aforesaid.

Copy of the title, preamble, and other parts of the Act of Parliament mentioned in the case.

An Act for dividing and inclosing certain Fields, Meadows, and Commons, in the manor of *Fulford* in the county of *York*.

Whereas by articles of agreement of 5 parts indented bearing date the 10th day of *December* in the year of our Lord 1756 and made or mentioned to be made between *John Taylor* of *Gate Fulford* in the county of *York* Esquire of the first part *Francis Meek* of *Beverley* in the same county Esquire of the second part the mayor and commonalty of the city of *York* of

the third part the Reverend *Benjamin Wilson Thomas Norton Richard Buxton William Charnock* and *William Nevison* feoffees of certain lands lying in *Gate Fulford* aforesaid in trust for the maintenance and support of a school at *Fremington* in *Swaledale* in the said county of *York* and for other charitable purposes of the fourth part *Robert Oates* of *Water Fulford* in the same county Esquire *Francis Barlow* of *Middlethorpe* in the county of the city of *York* Esquire *William Richardson* of *Gate Fulford* aforesaid gentleman *Edward Stabler* of the same place gentleman *Barnard Ackroyd* of the said city of *York* brewer and the several other persons whose names and seals are thereunto subscribed and set of the fifth part reciting that in the township of *Gate Fulford* aforesaid there is one large common field containing 300 acres of uninclosed land or thereabouts and one lesser common field containing 30 acres of uninclosed land or thereabouts and that there are also certain common meadow grounds in the same township called *The ings* containing 50 acres of land or thereabouts and certain large and extensive commons or waste grounds known by the names of the *East Moor* and the *West Moor* containing by estimation 400 acres of land or thereabouts and that the manor or lordship of *Fulford* in the said county comprehends the township of *Gate Fulford* aforesaid and part of *Water Fulford* aforesaid and that the said *John Taylor* is the lord of the said manor of *Fulford* and owner of several messuages cottages frontsteads and lands

sary full copies of the said act and award are to be referred to.

1856.

GATE
FULFORD
Case.

situate lying and being in the said manor and that the said *Francis Meek* is seized in fee simple of the impropriate rectory of *Gate Fulford* aforesaid and of all tythes great and small mortuaries and ecclesiastical dues (except such as are hereafter mentioned to belong to the curate or minister of the chapel of *Fulford*) arising renewing and payable out of all and every the lands and tenements in the said manor or lordship of *Fulford* aforesaid and that the said *Francis Meek* in right of his said rectory hath the nomination of the officiating minister or curate of the chapelry of *Fulford* aforesaid. And further reciting that the said commons or waste grounds belong to the said *John Taylor* the lord of the said manor and to all the other owners and occupiers of antient messuages cottages and frontsteads in the said manor or lordship subject to the right of certain freemen of the said city of *York* intercommoning therein as thereafter mentioned and that the owners and occupiers of such messuages cottages and frontsteads as aforesaid have also a right of stray or average in and over the said common fields and also in and over several inclosures which have been heretofore taken off from the said common fields at certain times in each year and that the freemen of the said city of *York* being occupiers of antient messuages within *Walmgate Ward* in the said city have also for time immemorial had and enjoyed and still have and enjoy a right of stray and average in and over the said common fields within certain bounds and the same respective inclosures

at the same times in each year when the owners and occupiers of messuages cottages and frontsteads in the said manor or lordship of *Fulford* can or may enjoy the same and that the said freemen being occupiers of antient messuages within the said ward have also for time immemorial had and enjoyed and still hold and enjoy a right of intercommoning along with the owners and occupiers of such messuages cottages and frontsteads as aforesaid in and upon the said commons and waste grounds, which said right of stray average and intercommoning in and upon the said common fields inclosures and commons or waste grounds as aforesaid is vested in the said mayor and commonalty for the benefit of such freemen inhabiting within *Walmgate Ward* as aforesaid and that the said *Robert Oates Francis Barlow William Richardson Edward Stabler Barnard Ackroyd* and the several other parties to the said articles respectively are owners of ancient messuages cottages frontsteads and lands in the said fields and ings and ancient inclosures in the said manor or lordship and that it was agreed by and amongst all the said parties to the said articles that the said common fields ings and commons or waste grounds should be divided and allotted to and amongst the proprietors thereof and persons interested therein respectively in the manner thereafter particularly expressed and that the same and also all the said inclosures should from thenceforth be held and enjoyed in severally freed and

1856.

 GATE
FULFORD
Case.

The manor of *Fulford*, mentioned in the said act and award, consists of the township of *Gate Fulford*,

discharged from all right of common and average whatsoever and that all the said lands so to be divided and allotted and also all the other tythable grounds lands and tenements in the said manor or lordship should be exempted from the payment of all tythes and ecclesiastical dues (except as before excepted) and that in lieu thereof a full and adequate compensation should be made to the said *Francis Meek* his heirs and assigns either by paying him a full and valuable consideration in money for the purchase thereof or by an allotment of lands or yearly payments or both as the commissioners thereafter named should think fit and that a certain part of the said west moor called or known by the name of the *Low Moor* containing 80 acres of ground or thereabouts should be allotted to the said mayor and commonalty of the said city of *York* in trust for and for the benefit of the freemen of the said city who are and shall be from time to time occupiers of ancient messuages within *Walmgate Ward* aforesaid to be held and enjoyed by them in severalty for ever freed and discharged from all right of common or other interests whatsoever of the other parties to the said articles or any of them of in or to the same in lieu of the rights of stray average and intercommoning in and upon the said common fields inclosures and commons or any of them to which the said freemen are so entitled as aforesaid.

But although the same will tend to the public good and be a manifest advantage to the several persons interested in the premises

and contribute to the improvement of their respective estates. Yet as the same cannot be effectually carried into execution to answer the intention of the parties without the aid and authority of an Act of Parliament.

May it therefore please your Majesty at the humble suit and request of your Majesty's most dutiful and loyal subjects the said *John Taylor Francis Meek* the mayor and commonalty of the said city of *York* and all the other parties to the said articles respectively that it may be enacted. And be it enacted by the King's most excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal and Commons in this present Parliament assembled and by the authority of the same that *Robert Bewlay* of the city of *York* gentleman *Richard Mason* of the said city gentleman and *Samuel Milbourn* of *Kirby Grindalyth* in the said county of *York* gentleman shall be and are hereby nominated and appointed commissioners for the dividing and allotting the said common fields ings and commons and for the executing the several other powers hereinafter mentioned and for that purpose they the said commissioners or the major part of them shall and may within twelve calendar months next ensuing cause a true and perfect survey and admeasurement to be made by such person or persons as they or the major part of them shall think fit of the said common fields ings and commons or waste grounds so intended to be divided as aforesaid and after such survey and admeasurement so made shall

and part of the township of *Water Fulford*, and there is a parish called *Fulford Ambo*, which is co-extensive

1856.

GATE
FULFORD
Case.

set out divide apportion and allot the same respectively in the manner hereinafter mentioned that is to say the said commissioners or the major part of them shall and may if they think fit set out and allot to and for the said *Francis Meek* his heirs and assigns such part or parts of the said common fields ings and commons or waste grounds respectively (except that part of the said commons called the *Low Moor* as aforesaid) as they or the major part of them shall deem to be a full and adequate compensation and equivalent for all the tythes of what nature or kind soever and ecclesiastical dues of or to which the said *Francis Meek* is so seized or entitled as aforesaid out of all and every the lands and tenements inclosed and uninclosed within the said manor or lordship of *Fulford* aforesaid or any of them or otherwise the said commissioners or the major part of them may if they think fit order and award such compensation to be made to the said *Francis Meek* for his said tythes by the payment of such sum of money to him the said *Francis Meek* his heirs or assigns as they the said commissioners or the major part of them shall deem to be a full and valuable consideration for the purchase of all the said tythes and ecclesiastical dues such sum to be charged upon all the lands and tenements in the said respective townships so to be exempted from the payment of such tythes in due and equal proportions according to the true and real value of such lands and tenements respectively or otherwise the said commissioners or the ma-

jor part of them may if they think fit order and award such compensation to be made to the said *Francis Meek* for his said tythes by certain yearly rents or sums of money to be charged in such due and equal proportions as aforesaid upon all the lands and tenements so to be exempted from the payment of such tythes and to be paid from time to time by the owners and proprietors of the said lands and tenements respectively in such manner as the said commissioners or the major part of them shall direct or otherwise the said commissioners or the major part of them may order and award such compensation to be made to the said *Francis Meek* for his said tythes partly by an allotment out of the said fields ings and commons so to be divided and allotted as aforesaid (except as before excepted) and partly by such yearly rents or sums of money to be charged as aforesaid and so much thereof in such lands and so much in money as they or the major part of them shall think most for the mutual benefit and advantage of the said *Francis Meek* and of all the said other parties respectively.

And it is hereby further enacted that the said commissioners or the major part of them shall and may set out and allot award or order to and for such owners and occupiers of messuages cottages and frontsteads in the said manor or lordship who have not any lands in the said common fields or either of them but only a right of stray or average therein either a competent part or parts of both or either of the said common fields as an equi-

1856.

 GATE
FULFORD
Case.

with the said manor. The road indicted which is 441 yards long and 40 feet wide, branches out of a public

valent for such right or a reasonable sum of money at the discretion of the said commissioners or the major part of them as purchase money for the same and to be charged in a due and equal proportion upon all the proprietors of lands in the said common fields which part or parts of the said fields so to be allotted or such purchase money shall be divided and paid to and amongst such owners and occupiers of messuages cottages and frontsteads as aforesaid so as that the owners or occupiers of messuages or frontsteads where messuages have been may have a double share to the owners or occupiers of cottages or frontsteads where cottages have been.

And the said commissioners or the major part of them shall and may set out and divide and allot the said common fields and ings (or such part or parts thereof as shall not according to the powers above mentioned be allotted as a compensation in lieu of such tythes or in lieu of such right of stray or average in the said fields belonging to those who have no lands in the said fields as aforesaid) to and amongst all the owners and proprietors of lands in the said fields and ings respectively in such shares and proportions as they the said commissioners or the major part of them shall adjudge and determine to be a full recompense satisfaction and equivalent for their several and respective lands therein.

Provided that the said commissioners or the major part of them shall have power to set out one statute acre of land or so much more as they shall think necessary

in some part or parts of the said common fields or either of them for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for repairing the highways in the said township of *Gate Fulford* anything herein contained to the contrary notwithstanding.

And it is hereby further enacted that the said commissioners or the major part of them shall and may set out divide and allot the residue of such commons and waste grounds (or such part thereof as shall not be allotted by virtue of the powers above mentioned as part of the compensation for such tythes) to and amongst the owners and occupiers of messuages cottages and frontsteads in the said manor or lordship in such manner as that the share of each owner or occupier of a messuage or a frontstead where a messuage hath been may be double in value quantity and quality considered to the share of each owner and occupier of a cottage or frontstead where a cottage hath been in lieu of their respective common rights in all the said commons or waste grounds in which allotments of the said commons or waste grounds no regard shall be had to the lands of any such owner and occupier nor to the magnitude or goodness of any house.

And it is hereby further enacted that the said commissioners or the major part of them shall have power to set out all such public and private ways and roads and ditches fences drains bridges gates and stiles as they shall think necessary or convenient in over and

highway between *York* and *Selby*, and leads to a landing place on the river *Ouse*, with a road branching

1856.

GATE
FULFORD
Case.

upon the lands so intended to be divided and allotted as aforesaid (so as all such public highways so to be set out be of the breadth of 40 feet at least between and excursive of the ditches) and to order and appoint by whom and in what manner all the said roads and ways ditches fences drains bridges gates and stiles shall respectively be made and thereafter from time to time repaired maintained and kept in repair and also divert and alter the course of any of the springs streams or currents of water within any part of any of the said fields ings or commons for the conveying of water to and for the benefit of the several allotments so to be made.

Provided that all such public and common highways when so set out and made as aforesaid shall from time to time be repaired and kept in repair by the inhabitants of the said township of *Gate Fulford* and that after such ways and roads shall be so set out and made it shall not be lawful for any person or persons in any manner whatsoever to use any other public or private way or road in or over the said lands so to be divided and allotted or any of them and that it shall not be lawful for any person or persons at any time hereafter to plant any trees within 10 yards of the said highways or any of them nor to turn any sheep into any lanes ways or passages on either side where of any new fences shall be made for the space of seven years after making the award hereinafter mentioned.

And for the preventing any disputes or differences relating to the said intended division and inclosure. It is hereby further enacted

by the authority aforesaid that the said commissioners or the major part of them shall within two years after such survey and admeasurement shall be made as aforesaid make or cause to be made an award or instrument in writing in which they shall express the quantity and contents in statute measure of the said common fields ings and commons or waste grounds so intended to be divided and inclosed as aforesaid and the quantity and contents situation buttals and boundaries of each and every parcel thereof which shall be assigned and allotted to the respective proprietors upon such partition and division as aforesaid and also the situation buttals and boundaries of all the lands and grounds so to be given and taken in exchange respectively and shall also express and ascertain what sum of money if any in the whole shall be paid to the said *Francis Meek* his heirs or assigns for the absolute purchase of his said tythes and ecclesiastical dues and when the same shall be paid and how much each of the said proprietors or their respective heirs or assigns shall pay or contribute towards making up the same and shall also express and ascertain the several yearly rents or sums if any which shall be paid and contributed by the said proprietors or their respective heirs or assigns to the said *Francis Meek* his heirs or assigns for and in lieu of such tythes and dues and at what time such payments shall commence and by what portions and at what times and place the same shall be made in each year and shall also ascertain and direct what sums of money if

1856.

GATE
FULFORD
Case.

from it to *Water Fulford*, as hereinafter described. It is set out in the award as follows.

any shall be paid by the respective proprietors of the said common fields to the owners or occupiers of such messuages cottages and front-steads respectively as aforesaid not having lands in the said fields in lieu of their right of stray and average in the said fields and at what time or times the same shall be paid and shall ascertain and direct how much shall be paid to each owner or occupier for the damage he or she may sustain by making fences ditches or drains on another persons wheat barley land and shall contain proper orders and directions concerning such public and private roads and ways and concerning the fences ditches drains bridges gates and stiles in over and upon the said lands so intended to be divided and inclosed as aforesaid together with all such other orders and directions as they the said commissioners or the major part of them shall think necessary or proper for the perfecting and completing the said intended division and inclosure according to the true intent and meaning of this Act and such award or instrument shall be fairly ingrossed upon parchment and sealed and delivered by the said commissioners or the major part of them and then enrolled at length in the public register office for registering deeds in the east riding of the said county of *York* and the register of the said east riding or his deputy is hereby required to enrol the said award amongst the enrolments of bargains and sales of lands in the same riding and to take such fees only as are due for enrolling any bargain and sale and a copy of such enrolment under the

hand of the said register or his deputy shall be admitted and allowed in evidence in all Courts of law and equity and the said register or his deputy shall be allowed for the making and signing any such copy twopence and no more for each sheet to contain 72 words and for every inspection or perusal of such enrolment one shilling and no more.

And it is hereby further enacted by the authority aforesaid that immediately after such division and allotments of the said common fields ings and commons or waste grounds shall be made and such award or instrument shall be executed as aforesaid all right of common stray or average as well in the said fields ings and commons as in the old inclosures within the said manor or lordship or any of them shall absolutely cease and be extinguished and all the lands and tenements within the said manor or lordship shall from thenceforth be absolutely freed and discharged from the payment of all tythes the ecclesiastical dues whatsoever (surplice fees and *Easter* offerings and such as are hereafter mentioned to belong to the curate or minister of the chapel of *Fulford* only excepted.)

Copy of Parts of the Award referred to in the Case.

The award of *Robert Bewlay* of the city of *York* gentleman *Richard Mason* of the said city gentleman and *Samuel Milbourn* of *Kirby Grindalyth* in the county of *York* gentleman commissioners appoint-

“ And we do order and award that there shall be one other carriage road branching out of this last men- 1856.

GATE
FULFORD
Case.

ed by an Act of Parliament made in the 30th year of the reign of our Sovereign Lord *George the Second* by the Grace of God of *Great Britain France and Ireland* King Defender of the Faith &c. intituled “ An Act for dividing and inclosing certain fields meadows and commons in the manor of *Fulford* in the county of *York*.” We the said commissioners having pursuant to the said Act caused a true and perfect survey and admeasurement to be made of the common fields ings and commons or waste grounds mentioned in the said Act and having divided and allotted the same unto and amongst the several proprietors interested therein and having executed to the best of our judgment the several other powers vested in us by the said Act do in further conformity to the said Act make this our award concerning the same as follows that is to say :

First we do allot and award one acre abutting on the south on the allotment of the said *John Taylor* hereinabove mentioned on the east and north on the last mentioned allotment of *Francis Smithson* and on the west on the allotment of the said *John Taylor* in the little ings as the same is staked out and we do award that the said one acre so set out shall be to and for the common use of the proprietors of the said fields to supply them from time to time with gravel or sand for repairing the highways in the said township of *Gate Fulford*.

Also we do allot and award unto the before named *Robert Oates* 101 acres 1 rood 19 perches abutting on the south on the allotment of

the said *John Taylor* on the east on the road leading from *Fulford* aforesaid to the allotment hereinafter to be mentioned and on the allotments of *William Richardson Francis Fothergill Matthew Thompson Rebecca Pacy Thomas Matthews Mary Atkinson and Ann Shaw* *Thomas Atkinson Robert Jackson Francis Wiley and John Atkinson* on the north on the allotments of *William Richardson and Mary Smith* and on the west on the old inclosure of *Water Fulford and Lincroft* and we do order direct and appoint that the said *Robert Oates* shall make and for ever maintain a sufficient ditch and fence on the east side thereof to divide the same from the road leading from *Fulford* aforesaid to the allotment hereinafter to be mentioned on the north to divide the same from the allotments of *William Richardson and Mary Smith* and on the west to divide the same from the estate of *George Palmes Esquire* called *Lincroft*.

Also we do allot and award unto the before named *Francis Barlow* 2 acres 2 roods 16 perches abutting on the south and west on the road leading from *Fulford* aforesaid to *Water Fulford* and to the landing place on the east on the road leading from *Fulford* to *Selby* on the north on the garths of *Edward Stabler* and the allotment of the heirs of the said *Edward Stabler* hereinafter mentioned and we do order direct and appoint that the said *Francis Barlow* shall make and for ever maintain a sufficient ditch and fence on the south and west sides thereof to divide the same from the road leading from *Fulford*

1856.

 GATE
FULFORD
Case.

tioned road and leading to *Water Fulford*, and the landing place hereinafter to be mentioned abutting on

to *Water Fulford* aforesaid and to the landing place and on the east to divide the same from the road leading from *Fulford* to *Selby*.

Also we do allot and award unto the heirs of the said *Edward Stabler* 2 acres 2 roods and 16 perches abutting on the south on the last mentioned allotment of the said *Francis Barlow* on the east on the garth of the heirs of the said *Edward Stabler* on the north on the allotment of the heirs of the said *Edward Stabler* in the great ings hereinbefore described and on the west on the landing place adjoining the river *Ouse* and we do order direct and appoint that the heirs of the said *Edward Stabler* shall make and for ever maintain a sufficient ditch and fence on the south side thereof to divide the same from the allotment of the said *Francis Barlow* hereinbefore mentioned and on the west to divide the same from the landing place adjoining the river *Ouse* and we do order and award that each of the said proprietors to whom the said allotments are so made shall inclose each his her and their own respective allotments within two months after the execution of this award.

And we the said commissioners in further performance of the said act do hereby order and award that there shall be such public and private roads and ways bridges and gates in over and upon the lands so allotted as hereafter mentioned which said roads and ways shall be made repaired and maintained as follows that is to say we do order and award that there shall be one public highway or road leading from the north end of *Fulford*

aforesaid to *York* abutting on the east on the several allotments of the said *William Smith Matthew Thompson William Richardson* the allotment of the said *John Taylor* for life with reversion to the said *Robert Oates* and the allotment of the said *John Taylor* as his own absolute estate of inheritance on the west on the allotment of the said *Thomas Barstow John Ward Barnard Ackroyd Francis Smithson* the heirs of the said *Edward Stabler* the said *Francis Barlow* the said feoffees of *Fremington* school the said *Francis Fothergill John Overend Roger Overend Thomas Matthews Jerom Dring and William Thompson* and we do order and appoint that there shall be one carriage bridge over the water sewer or drain crossing the said road between the allotments of the feoffees of *Fremington* school and the allotment of the said *John Taylor* for his life with reversion as aforesaid and one other carriage bridge in the road at the north end of the said town of *Fulford* and we do order and award that the last mentioned road and bridges shall be made and from time to time repaired by the inhabitants of the said township of *Gate Fulford* also we do order and award that there shall be another public highway or road branching out of the last mentioned road leading to the church of *Gate Fulford* to the ings and to the gravel pit through the allotment of the said *John Taylor* in the great and little ings abutting on the south on the allotments of *John Ward William Plowman Barnard Ackroyd and John Smith* and on the north on the allotments of

the allotment of the before named *Francis Barlow* and the heirs of the said *Edward Stabler* hereinbefore

1856.

GATE
FULFORD
Case.

the said *Barnard Ackroyd* and *John Taylor* and on the well house garden belonging to the said *John Taylor* And that the said public road to the church of *Gate Fulford* aforesaid shall lead into the allotment of the said *John Taylor* at the south west corner thereof and through the same to the gate into the church yard of *Fulford* aforesaid also we do order and appoint that there shall be one carriage bridge at the east end of the said road And we do award that the said last mentioned road shall be a public road as well for the use of the proprietors and occupiers of lands in the great and little ings hereinbefore mentioned as for the inhabitants of *Fulford* aforesaid for leading gravel or sand for repairing the public high roads within the said township of *Fulford* And we do order and award that the same road and bridge shall be made and from time to time repaired by the inhabitants of the said township of *Gate Fulford* aforesaid Also we do order and award that there shall be another public highway or road from *Fulford* to *Heslington* branching out of the aforesaid road from *Fulford* to *York* abutting on the south on the garth of the said *John Taylor* the said *John Taylor's* garth ends closes and the said *John Taylor's* brick closes on the east moor abutting on the allotment of *Clifford Baldock* on the north on the allotments of *Mary Smith Francis Wiley Thomas Lambert John Ward* and *Edward Thwing* and passing through the old inclosure of the said *John Taylor* called the *Brecks* into the east moor abutting on the north on the low moor allotted to

the mayor and commonalty of the city of *York* in trust as aforesaid and leading on to *Heslington* common And we do order and appoint that there shall be one carriage bridge over the ditch in the said road leading into the said *John Taylor's* close called the *Brecks* and one other carriage bridge at the east end of the said road leading to the east moor and that there shall be one public carriage gate at the west end of the same road towards *Fulford* and at the east end thereof leading to *Heslington* common which said road bridges and gates shall be made and from time to time repaired by the inhabitants of the said township of *Gate Fulford* And we do order and award that there shall be one private carriage road branching out of the last mentioned road leading to the old inclosure hereinafter mentioned of the before named *John Taylor John Overend* and *Edward Thwing* and to the inclosure of *John Coopland* called *Blackburn Closes* abutting on the west on the allotments of the said *Edward Thwing* and *Matthew Thompson* and part of the allotment of the before named *William Richardson* which last mentioned road shall be made and kept in repair by the proprietors of the allotments through which the said road leads Also one other private carriage road on the east moor aforesaid branching out of the road from *Fulford* to *Heslington* hereinbefore mentioned through and over the west end of the allotments of *Clifford Baldock Parker Duffield Joseph Mollett Edward Thwing Richard Overend Christopher Waite* and so on to the allotment of

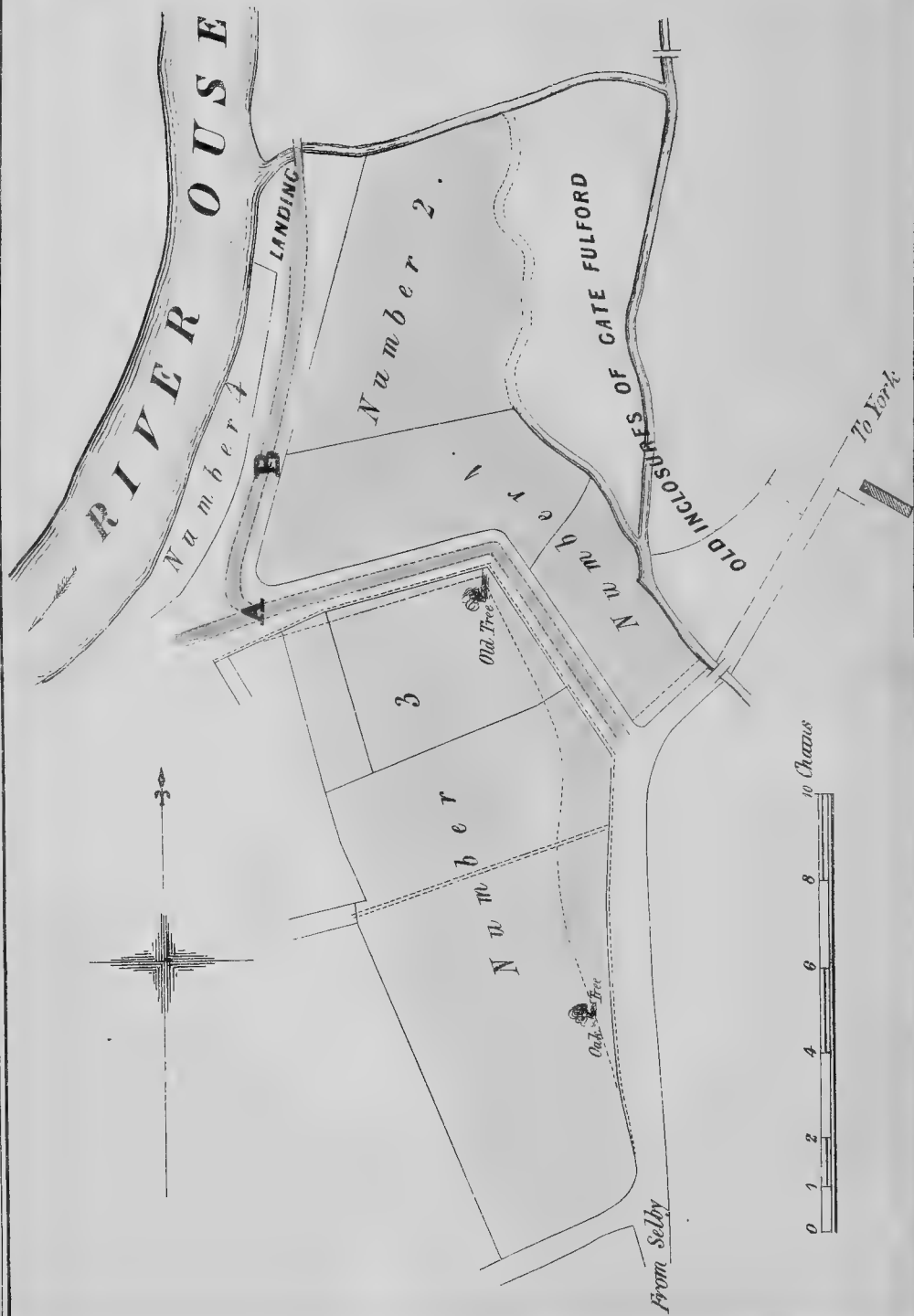
1856.

GATE
FULFORD
Case.

mentioned, and one carriage bridge over the water sewer across the road running into the allotment of

Edward Lofthouse on the west end thereof And we do order and direct that there shall be one carriage bridge over the ditch of the said *Parker Duffield's* allotment And one other carriage bridge over the ditch of the said *Edward Thwing's* allotment which said bridges shall be at first made at the expense of the proprietors of allotments upon the said commons and shall afterwards from time to time be repaired and maintained by the person and persons to whom the fences or allotments belongs in which each such bridge is made and that all such bridges shall be kept of a sufficient width and depth for the carrying off the water which ought to run through the same And we do order and award that each of the proprietors of allotments through which the said last mentioned road leads shall make and from time to time repair and maintain so much thereof as leads through their own respective allotments And we do also order and award that each of the proprietors of allotments by which the said last mentioned road leads shall hang and for ever keep up and maintain in the same road sufficient gates at the end of the north fence of their respective allotments In consideration whereof we do award that the said proprietors shall for ever have and enjoy the use and benefit of the lane in which the same road is exclusive of all others Also we do order and award that there shall be one other public carriage road leading from the south end of *Fulford* aforesaid to *Selby* And we do order and direct that the last mentioned carriage road shall be

raised and made three feet higher than the said road now is where the same shall be necessary for the safety of travellers and that there shall be one carriage bridge of two arches of a sufficient height and wideness for the passage of water in the time of floods in proportion to the height of the road as directed to be raised And that the same road and bridge so raised and made shall be from time to time maintained and repaired by the inhabitants of the said town of *Fulford* And we do order and award that there shall be one other carriage road branching out of this last mentioned road and leading to *Water Fulford* and the landing place hereinafter to be mentioned abutting on the allotment of the before named *Francis Barlow* and the heirs of the said *Edward Stabler* hereinbefore mentioned and one carriage bridge over the water sewer across the road running into the allotment of the said *Francis Barlow* which said road and bridge shall be made and from time to time kept in repair by the inhabitants of the township of *Fulford* aforesaid And also one other carriage road leading from *Fulford* aforesaid to the several allotments on the west moor and the old inclosure hereinafter mentioned through the allotment of the before named *Mark Pallister* into *Dam Lands Field* abutting on the east on the allotments of the said *Mark Pallister Christopher Waite Mary Atkinson* and *Ann Shaw* and *Elizabeth Godfrey* on the west on the allotments of the said *Thomas Lambert James Wass William Smith* and *John Atkinson* on the west



1856.

 GATE
FULFORD
Case.

the said *Francis Barlow*, which said road and bridge shall be made and from time to time kept in repair by the inhabitants of the township of *Fulford* aforesaid."

The annexed plan shows the road in question, the lands on which the road abuts, the landing place referred to in the above extract from the award and portions of the river *Ouse* and of the highway between *York* and *Selby*, also referred to in the same extract. The road in question is coloured brown on the said plan.

The close numbered 1 on the said plan is the piece of land containing 2 acres, 2 roods, 16 perches, which by the award was allotted to *Francis Barlow*. This close has since the making of the award been rated to the township of *Water Fulford*. The close numbered

moor on the said road leading from *Dam Lands Field* on the east on the allotment of the before named *Thomas Barstow* to the corner of *Rebecca Pacy's* old inclosure called *New Fields* and adjoining on the old inclosure to *Rusam Close Nook* and to the old inclosure of *Mary Tennant* called *Pighill* abutting on the west on the several allotments of *John Atkinson Francis Wiley Robert Jackson Thomas Matthews Rebecca Pacy Matthew Thompson Francis Fothergill William Richardson Robert Oates* and *John Taylor* And we do order and direct that there shall be one carriage bridge and gate on the north end of the said road leading into the allotment of the said *Mark Pallister* one other carriage bridge over the ditch of the south hedge of *Christopher Waite's* allotment in *Dam Lands Field* one other carriage bridge at the south west corner of *Dam Lands Field* leading into the west moor one other carriage bridge over the drain or water sewer from the north west corner of the old inclosure of *Rebecca Pacy* one other carriage bridge over the

ditch on the north of the said *Thomas Matthew's* allotment one other carriage bridge over the water sewer adjoining the allotment of the said *Thomas Matthews* one other carriage bridge over an hollow place at the south west corner of *Rebecca Pacy's* new field one other carriage bridge over an hollow place adjoining the allotment of the said *Matthew Thompson* one other carriage bridge over the ditch on the north side of the said *Francis Fothergill's* allotment And one other carriage bridge over an hollow place adjoining the said *Robert Oates's* allotment All which said bridges are to be made on the road to the *Dam Lands Field* and on the west moor And we do order and award that there shall be one other carriage bridge over the water sewer near the west corner of *Mary Tennant's Pighill* close which said road bridges and gates we do direct and appoint to be made and from time to time kept in repair by the several proprietors of allotments on the said east and west commons or moors.

1856.

 GATE
FULFORD
Case.

2 on the said plan is the piece of land also containing 2 acres, 2 roods, 16 perches, which by the said award was allotted to the heirs of *Edward Stabler*. This last mentioned close has since the making of the award been rated to the township of *Gate Fulford*. The land numbered **3** on the said plan, and which was not allotted by the award, is in the township of *Water Fulford*. No evidence was given as to which township the strip of land numbered **4** on the said plan was rated, or to whom it belonged. Besides the said piece of land allotted to *Francis Barlow*, and which as above stated has since the award been rated to the township of *Water Fulford*, there was an allotment of 101 acres, 1 rood, 19 perches, to *Robert Oates*, which has also since the award been rated to the township of *Water Fulford*; but with the exception of those two allotments, all the allotments under the award have since the making thereof been rated to the township of *Gate Fulford*.

At the point **A** on the said plan a road¹ branches from the road in question towards the south west into *Water Fulford*. The length of the road in question from the highway between *York* and *Selby* to the point **A** is 233 yards; from the point **A** to the point **B** it is 76 yards, and from the point **B** to the landing place it is 132 yards.

The landing place is used by the inhabitants of the townships of *Gate Fulford* and *Water Fulford* without paying any toll. From all other persons using the said landing place the Lord of the Manor of *Fulford* has been in the habit of exacting a toll for the use thereof.

The Lord of the Manor of *Fulford* is the owner of the land on both sides of the road as delineated on the plan, with the exception of the said parts numbered respectively **2** and **4**.

Evidence was given at the trial on behalf of the

prosecution that the road in question was used by all persons who chose to use it for the purpose of going to and from the said landing place for the use of the same in the manner hereinbefore described, and that on various occasions till within the last fifteen or twenty years it had been repaired from time to time by the surveyors of the highways of the township of *Gate Fulford* and by occupiers of land in that township, and that for the purpose of such repairs materials had been used which had been gotten from the acre of land set out under the award for getting sand or gravel for repairing the highways in the township of *Gate Fulford*. It was also proved, on cross-examination of witnesses for the prosecution, that similar repairs were done from time to time during the same period by the said surveyors and occupiers of land in the said township of *Gate Fulford* to all the bye roads as well as the public roads in that township, and also that repairs to the road indicted were done during the surveyorship of a Mr. *Wormald*, who was proved to have used the said road very much for the purpose of carting timber to and from the said landing place.

1856.

GATE
FULFORD
Case.

The road in question was out of repair as charged in the indictment.

The counsel for the prosecution contended that under the circumstances above set forth the defendants were liable for the non-repair of the said road as charged in the indictment.

The defendants' counsel, on the other hand, contended :

1st. That the defendants were not liable.

2nd. That the commissioners had no power under the act to deal with any part of the manor which was not in the township of *Gate Fulford*.

3rd. That they were only empowered to throw on the defendants the burden of repairing the high roads

1856.

 GATE
FULFORD
Case.

over the inclosed lands in the township of *Gate Fulford*.

4th. That if the road was one which they had authority to deal with at all, as they had not by their award declared it to be a public highway, they had no power to throw the burden of repairing it on the defendants.

5th. That it could only be made a public highway by the award.

If the Court of Criminal Appeal shall be of opinion that the defendants are not liable as charged in the indictment then a verdict thereon is to be entered for them ; otherwise the verdict entered for the Crown is to stand.

C. CRESSWELL.

This case was argued on 31st *May*, 1856, before Lord CAMPBELL C. J., ALDERSON B., COLERIDGE J., CRESSWELL J. and BRAMWELL B.

Kemplay (*Hugh Hill* Q. C. with him) appeared for the Crown, and *T. F. Ellis* (*Price* with him) for the defendants.

Kemplay, for the Crown, commenced by contending that the award made the road a public highway so as to be repairable by the defendants under section 13 of the Inclosure Act ; but

Per CURIAM.—The defendant's counsel must be first heard, that being the invariable practice of this Court.

T. F. Ellis, for the defendants. First: as the attempt is to impose a burthen on the township contrary to common law, the prosecutor must bring the case strictly within the Act of Parliament and the award. The commissioners had no power to order the township to repair private roads ; *Rex v. Inhabitants of Cottingham* (a), *Rex v. Inhabitants of Enfield* (b), *Rex v. Richards et al.* (c), *Rex v. Inhabitants of Edmon-*

(a) 6 T. R. 20.

516, (ed. 29).

(b) Note (b) to 3 Burn's Justice,

(c) 8 T. R. 634.

ton (a). And they have not made this a public road by the award; they make it simply a carriage road. But throughout the award the public roads are expressly so termed. It is true that this is not called expressly a private road, and that some roads are called private; but it will be found that where neither word is used a private road is meant, as in the case of the road next following, where a road, not described as public or private, is not made repairable by the township of *Great Fulford*, as all public roads must be. The Act of Parliament enacts that, after the award no public or private roads shall be made except those set out in the award. The indictment, so far as it is now in question, charges no publicity except that given by the award; and, indeed, at common law, the parish, not the township, would be liable to the repair of any public road. Besides, here the road in question ends in private land, for the ferry is not a public one: no one can use it (except upon a payment to the owner, which is not fixed, and appears to be discretionary,) besides the inhabitants of the two townships, and there cannot be a dedication to a part of the public; *Poole v. Huskinson* (b). If the question arose (which it does not) whether this was independently of the award a public or private road, it would clearly appear to be private, for the occasional repair is of no weight against the facts shown as to the nature of the road; per Lord *Tenterden C. J.*, in *Rex v. Enfield* (c).

The commissioners, it is to be observed, have not, in fact, ordered the repairs to be performed by the township of *Gate Fulford*; they say only, "the township of *Fulford* aforesaid." They, probably, meant neither the township of *Water Fulford* nor the town-

1856.

 GATE
FULFORD
Case.

(a) 1 Moo. & Rob. 24.

(b) 11 Mee. & W. 827.

(c) Note (b) to 3 Burn's Justice, 516, (ed. 29).

1856.

 GATE
FULFORD
Case.

ship of *Gate Fulford*, but only the mass of houses constituting in a popular sense the town of *Fulford*, as to which they had no power, and which is, at any rate, not the township of *Gate Fulford*.

But it is unnecessary for the defendants to show more than that the common law liability of the parish is not altered by express words; nothing but unambiguous language can make the township liable.

Secondly. The commissioners had no power to make this a public road. The Act of Parliament confines their power in this respect to the roads in *Gate Fulford (a)*; but the case shows that part of this road is in *Water Fulford*. Now, if a part of the road be such that the commissioners could not set it out, the setting out is invalid as to the whole road.

LORD CAMPBELL C. J.—In such a case the public would not have the intended benefit.

Kemplay here intimated that he should concede that, if the commissioners had exceeded their authority in setting out a part of the road, the road would not be such a public highway as the defendants would be liable to repair under the act.

CRESWELL J.—The commissioners have power under the act to deal with interests co-extensive with the whole manor which includes part of *Water Fulford*.

T. F. Ellis. Then it is elementary law that no presumption can be made to raise jurisdiction; it is for those insisting on jurisdiction to prove it.

LORD CAMPBELL C. J.—We do not sit here to weigh evidence; if there was anything from which the jury could infer the fact necessary for the jurisdiction we cannot disturb the verdict.

(a) The argument as to this, which turned on the language of the Act, is omitted; as the Court

decided against the defendants even upon the supposition that they were entitled so to construe the Act.

CRESSWELL J.—And there was evidence, however met, of some repairs having been done by the defendant township. May not the jury have inferred from this that, at the time of the award made, all the road lay in *Gate Fulford*?

1856.

GATE
FULFORD
Case.

T. F. Ellis. They could not, for it appeared that the township repaired also the private roads; and, according to Lord *Tenterden*, (as before cited) such evidence is of no weight. The contrary was taken for granted on both sides at the trial; the opinion of the jury was never asked at all; the intention was to raise the question for the Court on the supposition that part of the road had never been in *Gate Fulford*.

LORD CAMPBELL C. J.—I do not find that in the case stated.

Kemplay was not called upon by the Court.

LORD CAMPBELL C. J.—There is no reason to disturb the verdict. It sufficiently appears that the road was to be a public one, and that it was set out under the powers of the act.

ALDERSON B.—The road is clearly a public one, and set out over lands intended to be inclosed.

The other learned Judges concurred.

Conviction affirmed.

1856.

REGINA v. MARY BRIGGS..

The prisoner was convicted on an indictment for bigamy.

It appeared that her first husband had been continually absent from her for seven years next preceding the second marriage; on which occasion she represented herself as a single woman, and was married by her maiden name. The jury, being asked to consider whether she knew her husband to be alive at the time of the second marriage; and, if not, whether she had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them. *Held*, that upon that finding the conviction could not be sustained.

Quære, whether the onus was cast on the prosecution of proving that the prisoner knew that her husband was alive, or on the prisoner of proving that she did not know it.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by COLERIDGE J.

The prisoner was tried and convicted before me at the Summer Assizes, 1856, for *Cambridge*, on a charge of bigamy. The two marriages were satisfactorily proved; the first with *John Briggs* on the 22nd *January*, 1844, at *Altonbury*; the second with *William Cooper* on *March* 27, 1856, at *Cambridge*. The prisoner on both occasions was married by her maiden name of *Riggle*, and *William Cooper*, who was called, swore that she had represented herself to him as a single woman. *Altonbury* and *Cambridge* are both in the same county, and about 24 miles apart. *John Briggs* was considerably older than the prisoner, a labouring man living in lodgings, working at a farm about two miles from *Altonbury*, sometimes absent from it for a month at a time. It was said that she had left him at the end of four months from the marriage, and the witness, who stated this, had not seen her subsequently. On this evidence it was contended for the prisoner, that it must be taken that the husband had been continually absent from the prisoner for the space of seven years next preceding the second marriage; that there was no evidence that she knew him to be living at the time of such

marriage, and that she was not bound to make any inquiry. 1856.

BRIGGS'S
Case.

I desired the jury to say, whether in their opinion the prisoner knew her husband to be alive at the time she contracted the second marriage; and, if not, whether she had had the means of acquiring the knowledge, directing them, even if they thought her ignorant in fact of her husband's being alive, still to find her guilty, if they also thought that by the exercise of reasonable diligence, in making inquiry, she might have informed herself, and neglected to use such diligence.

The jury said they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge, if she had chosen to make use of them. I directed a verdict for the Crown, but bailed the prisoner and respited the sentence.

I now request the opinion of the Judges on the propriety of the conviction.

J. T. COLERIDGE.

This case was argued on 15th *November*, 1856, before POLLOCK C. B., COLERIDGE J., WILLES J., BRAMWELL B. and WATSON B.

D. Power appeared for the prisoner; no counsel appeared for the Crown.

Power, for the prisoner. Upon the words of the statute the prisoner was not bound to make any inquiry whether her first husband was alive or not; but it was incumbent on the Crown to shew that she knew he was alive. The statute 9 *Geo. 4. c. 31. s. 22.* enacts, "that if any person being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in *England* or elsewhere, every such

1856.

BRIGGS'S
Case.

offender, and every person counselling, aiding or abetting such offender shall be guilty of felony."

Then comes the proviso on which the question in this case turns, by which it is enacted that nothing therein contained shall extend to "any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time" (a).

The facts in *Regina v. Thomas Jones* (b) were very similar to the facts in the present case. There it appeared that the prisoner's first wife had left him sixteen years, and it was proved by the second wife that she had known him for nine years living as a single man, and that she had never heard of the first wife, who, it appeared, had been living seventeen miles from where the prisoner resided, and it was held, that the prisoner ought to be acquitted; and CRESSWELL J. there said, "There is no proof that the prisoner knew that his first wife was living, and in the absence of that proof I think he comes within the proviso" (c). What I submit is, that the onus of proof lies first on the Crown to prove the second marriage; then

(a) That is, has not been known at any period during those seven years; *Regina v. Cullen*, 9 Car. & P. 681. The obligation of a person to use reasonable diligence to inform himself of the fact, and the question whether, if he neglect or refuse to avail himself of palpable means of acquiring such information, he will stand excused, are points which do not appear to have been settled. See 1 Russ. on C. & M., by Greaves, p. 187, referring to 1 East, P. C. c. 12. s. 4. p. 467, where Mr. East

says: "that they are questions which he does not find anywhere touched upon; but which seem worthy of mature consideration."

(b) Car. & Marsh. 614.

(c) In his judgment CRESSWELL J. also observed upon the fact that the second wife had proved that she never knew or heard of a former wife; and, under the circumstances of that case, this was some evidence that the former wife was not known by the prisoner to be living.

it is for the prisoner to show a continuous absence for seven years, and when this is done the onus is again shifted, and it is for the Crown to show that the former husband or wife has been known by the prisoner to be living within that time.

1856.

BRIGGS's
Case.

COLERIDGE J.—The prisoner does not satisfy the proviso by merely proving absence. The jury do not find that the prisoner was ignorant.

Power. When continuous absence for seven years is proved, the presumption is against knowledge on the part of the prisoner.

POLLOCK C. B.—If there was no evidence of knowledge, must not the jury be taken to have found that there was no knowledge?

Power. There was no evidence one way or the other, and ignorance must be assumed. Every person has in some sense the means of obtaining knowledge. If a person is in *Australia* you may write or advertize. A woman can never safely marry again if she is bound to wait until she has exhausted all means of knowledge. Under the provisions of the statute 1 Jac. 1. c. 11., a person whose consort had been abroad for seven years, though known to be living, might have married with impunity (*a*). The present statute, by its second exception, after enacting that its provisions shall not extend to “any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past,” adds, “and shall not have been known by such person to be living within that time.” Here, by the express words of the enactment, the effect of the construction put upon the first exception in the 1 Jac. 1. is done away with; but the legislature, in making that an offence which was not

(*a*) See 1 Hale, P. C. 693 ; 3 Inst. 88 ; 1 East, P. C. c. 12. s. 3. p. 466.

1856.

BRIGGS'S
Case.

an offence before, namely, marrying after a seven years' absence, when the party marrying knows that the other is living, must be taken to have intended that the onus of proving the commission of that offence, by showing the knowledge, should be upon the party prosecuting.

WILLES J. referred to *Best on Evidence* (which he characterised as one of the best books on our laws) as to proof of a negative.

BRAMWELL B.—If the statute had said that it should not extend to any person “who shall have been ignorant” that the first husband was alive, would not the prisoner be bound to give some evidence of ignorance?

Power. I submit that she would not; but here the jury were told to find the prisoner guilty, even supposing her to have been ignorant, if she had the means of knowledge.

POLLOCK C. B.—The question is whether the crime created by the statute was proved. If the question of means of knowledge is let in there would be no limit to the inquiry; one man may have the means of knowing what passes in another town, while another may not have the means of knowing what takes place in the next street.

Power. The onus is upon the prosecution, who must make out that the statutable offence has been committed, and it was not for the prisoner to prove her innocence. The ruling of CRESSWELL J., in *Regina v. Jones*, is right, and this conviction is wrong.

POLLOCK C. B.—We are all of opinion that the conviction cannot be supported. The jury merely find that they have no evidence of the prisoner's knowledge, and the effect of that, in my opinion, is that they must be taken to have found that she did not know. But then it is said that she had the means of acquiring knowledge if she had chosen to make use

of them. The means of knowledge may be very difficult or very easy. They may be so easy that a fact may be ascertained by putting a question to any one on a market-day at the next market-town, or they may be so difficult that the fact can scarcely by possibility be ascertained. The possession of such means of knowledge as I have first suggested might with other circumstances, as, for example, the second marriage being contracted by the prisoner in her maiden name, warrant a finding that, having the means of acquiring knowledge, she did use them and did know, and upon such a finding the conviction might be sustained ; but in the absence of such a finding by the jury I do not think we can supply the deficiency.

1856.

 BRIGGS's
Case.

There is another point of importance, namely, on whom the burden of proof lies. That is a very serious question upon which I give no opinion. The jury have found that there was no evidence of knowledge, and therefore the conviction cannot be supported.

COLERIDGE J.—I agree that this conviction cannot be sustained ; but I was anxious that the Court should not decide that, as a general rule, the onus of proving knowledge is upon the prosecution. The onus of proof is an important and difficult question on which we express no opinion. With respect to the interpretation put upon the finding of the jury by the Lord Chief Baron, it does not seem to me that the jury have said that the prisoner in point of fact did not know, and I do not think they meant to say that, but rather, on the contrary, that she probably did know, though the evidence was not quite sufficient to warrant them in finding that she did. However, I concur in holding the conviction wrong on the simple ground that the finding of the jury was imperfect.

1856.

BRIGGS'S
Case.

WILLES J.—I am of the same opinion. The finding of the jury is imperfect.

BRAMWELL B.—I think the conviction cannot be sustained, and on this ground,—the jury have not found that the prisoner knew. All they have said amounts to this,—we cannot say that she did not know.

WATSON B. concurred.

Conviction quashed.

Post 368

1856.

REGINA v. WILLIAM MOSS.

In an indictment under section 17 of 8 & 9 *Vict. c. 109.*, for winning money at cards by fraud, unlawful device and ill practice, it is not necessary to state to whom the money belonged.

Quære whether, in order to constitute an offence under the statute in question, it is necessary that any money should be actually obtained.

THE following case was stated for the consideration and decision of the Court of Criminal Appeal by the Chairman of the Quarter Sessions for the county of *Berks*.

At the General Quarter Sessions of the Peace of our Sovereign Lady the Queen, holden at *Abingdon*, in and for the county of *Berks*, on *Monday*, the thirtieth day of *June*, in the twentieth year of the reign of our Sovereign Lady *Victoria*, by the grace of God, of the United Kingdom of *Great Britain* and *Ireland*, Queen, Defender of the Faith, and in the year of our Lord 1856, before *Thomas Bros*, Esquire, Chairman, *George Charles Cherry*, Esquire, and others, their fellows, keepers of the peace and justices of our said Lady the Queen, assigned to preserve the peace in the said county, and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the said county, and so forth, one *William Moss* was indicted under the seventeenth section of the Act of the 8 & 9 *Vict. c. 109.*, which

section is as follows: “ And be it enacted, that every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly.”

1856.

Moss's
Case.

The indictment was in the words following, that is to say:

“ *Berks* to wit. The jurors for our Lady the Queen upon their oath present, that *William Moss*, on the ninth day of *June*, in the year of our Lord one thousand eight hundred and fifty-six, by fraud, unlawful device and ill practice in playing at and with cards, unlawfully did win from one *Henry Fitz Gerald Bernard* to a certain person whose name is to the jurors unknown a certain sum of money, with intent to cheat him the said *Henry Fitz Gerald Bernard* of the same, to the great damage of the said *Henry Fitz Gerald Bernard*, to the evil example of all others in the like case offending, against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.”

The jury, upon the trial of the above indictment, returned a verdict of guilty against the defendant, whereupon Mr. *Metcalfe*, of counsel for the defendant, moved the Court, in arrest of judgment, that the said indictment was bad for not alleging that the money

1856.

Moss's
Case.

won by the said *William Moss* was the monies of the said *Henry Fitz Gerald Bernard*; and he cited the case of *Regina v. Sill* (a).

The Court of Quarter Sessions overruled the said objection, but reserved the point on the validity of the said indictment for the consideration of this Honourable Court, and gave judgment that the defendant be imprisoned and kept to hard labour for six calendar months, but they respite the execution of the said judgment until this Court shall have decided upon the validity of the said indictment, and they discharged the defendant upon recognizance of bail, conditioned to appear and render himself in execution if this Honourable Court shall be of opinion that the above judgment be affirmed.

The question submitted for the opinion of this Court is, whether the judgment upon the said conviction shall be arrested by reason of the alleged defect in the said indictment?

T. Bros, Chairman.

This case was argued on 15th *November*, 1856, before POLLOCK C. B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

Carrington appeared for the Crown, and *Metcalf* for the prisoner.

Metcalf, for the prisoner. The indictment is bad, for omitting to state whose property the money was. By the statute 8 & 9 *Vict.* c. 109. the offence here charged is assimilated to that of obtaining money or goods by false pretences. Previously to the 14 & 15 *Vict.* c. 100. it was well settled that in an indictment for false pretences it was necessary to state the ownership of property as in a case of larceny.

(a) 1 El. & Bl. 553; S. C. Dears. C. C. 132.

Regina v. Norton (a), *Rex v. Martin* (b), *Regina v. Parker* (c) and *Regina v. Marsh* (d) are conclusive upon the subject; and in *Regina v. Martin* the objection that such ownership was not stated was held fatal after verdict; and the reasons upon which these decisions are founded seem to be that the money or goods might be the property of the defendant himself, or *bona vacantia*, and that without such an allegation the prisoner would be unable to plead *antrefois acquit* or *antrefois convict*. The case of *Sill v. The Queen* decides that such a defect is not cured by 14 & 15 Vict. c. 100. The statute against false pretences and this statute are identical, and the same rule applies.

1856.

Moss's
Case.

BRAMWELL B.—In false pretences the offence is, obtaining some particular money, or a definite thing. Here the offence is, not the actual obtaining any specific money or chattel, but it is the *winning*. Suppose the loser did not pay? The allegation here is, not that the defendant won a definite sum, but a right to have a certain amount.

POLLOCK C. B.—This is not an indictment for obtaining money by false pretences, but is under a statute which says, that if a person does certain things he shall be deemed to have obtained money by a false pretence.

Metcalf. Winning can only mean obtaining, or attempting to obtain, and in either case it should be shown to whom the money belonged. The precedent for an indictment under this statute in *Archbold's Criminal Pleading*, by Welsby, 11th edition, p. 674, contains the words, "of the moneys of the said J. N." That precedent is founded on the forms in 6 *Wentworth*, 383. 391., which were framed upon the fifth

(a) 8 Car. & P. 196.

(c) 3 Queen's Bench Rep. 292.

(b) 8 Ad. & El. 481.

(d) 1 Den. C. C. 505.

1856.

Moss's
Case.

section of 9 *Anne*, c. 14., the provisions of which are identical with those of the present statute, except that the statute of *Anne* imposes a penalty, and this statute a punishment as for obtaining money by false pretences.

Carrington, for the Crown, was not called upon by the Court.

POLLOCK C. B.—I am of opinion that the indictment is quite sufficient. The learned counsel for the prisoner has cited cases to show that an indictment for obtaining money or goods by false pretences must state to whom the money or goods belonged. The true reason of that was, that if an indictment for obtaining money or goods by false pretences omitted to state to whom the money or goods belonged, it would be impossible to plead an acquittal or conviction on such indictment in bar to a subsequent prosecution in respect of the same matter (*a*). That reason does not apply in the present case where the prisoner is indicted under this statute for winning a sum of money. Whether the word “winning” is used in this statute in the limited sense in which “winning” is used in the mining districts, and means actually getting and obtaining the money, or in its more general sense of obtaining a title to a sum of money by becoming the winner of a stake, no ambiguity can arise if the offence is stated as it is in this indictment in the very words of the statute; and it would create great difficulty in drawing indictments under this act of Parliament if it were held necessary that it should be stated to whom the money which actually was won belonged.

ERLE J.—I agree that as this indictment follows the words of the statute it is sufficient, and the con-

(*a*) See per ALDERSON B., in *Regina v. Norton*, 8 Car. & P. 196.

viction was right. It was a most salutary statute (a) that enacted that where an offence has been created by statute the indictment shall, after verdict, be held sufficient if it describe the offence in the words of the statute.

1856.

Moss's
Case

No doubt there are cases in which this enactment has been held not to be applicable, and in which it has been decided that more is requisite in the indictment than the description of the offence in the words of the statute creating it; and I should feel myself bound by those cases if they were in point on the present occasion, but it seems to me that the principle on which those cases were decided does not apply to the present indictment which follows the words of the statute, and is therefore, I think, sufficient.

WILLES J., BRAMWELL B. and WATSON B. concurred.

Conviction affirmed.

(a) 7 Geo. 4. c. 64. s. 21.

REGINA *v.* FREDERICK WEST and ELIZABETH WEST.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal A. and B. were convicted on an indictment charging

A. with stealing ninety-five pounds *in money*, and *B.* with receiving five pounds *in money*, part of the said ninety-five pounds, knowing it to have been stolen. It appeared in evidence that *A.* stole certain notes of a provincial bank which were not then in circulation for value, but which were paid in at one branch of the bank, and were in course of transmission to another branch, at which they had been originally issued, in order that they might be there re-issued or otherwise disposed of, it not being the practice of the bank to re-issue at one branch notes originally issued at another; and it also appeared that *B.* received one of such notes knowing it to have been so stolen.

Held, that the conviction was right, the notes being "bank notes" within the meaning of section 18 of 14 & 15 *Vict.* c. 100., and therefore properly described as money in the indictment.

1856.

WEST'S
Case.

Appeal by the Chairman of the General Quarter Sessions for the *Isle of Ely*.

Frederick West and *Elizabeth West* were charged on an indictment (a copy of which is hereunto annexed) (a), the said *Frederick West* with stealing 95*l.* in money, and the said *Elizabeth West* with receiving 5*l.* in money, part of the said 95*l.*, knowing them to have been stolen.

The manager of *The National Provincial Bank of England* at *Boston*, enclosed in an envelope, addressed to the manager of the same bank at *Wisbech*, nineteen 5*l.* notes of the said bank, issued at *Wisbech*, which had been paid into the branch bank at *Boston*. The bank do not re-issue at one branch notes originally issued at another branch, but transmit them to the place where they were originally issued to be there re-issued or otherwise disposed of. The envelope and nineteen notes enclosed therein were put

(a) The following is a copy of the indictment referred to.

[*Isle of Ely*.] The jurors for our Sovereign lady the Queen upon their oaths present that before and at the time of the committing of the offence hereinafter next mentioned *Frederick West* was clerk to one *Robert Bell* and others and that the said *Frederick West* whilst he was such clerk to the said *Robert Bell* and others to wit on the seventeenth day of *November* in the year of our Lord 1855 at *Wisbech* in the *Isle of Ely* and within the jurisdiction of this Court feloniously did steal take and carry away ninety-five pounds in money of the monies goods and chattels of the said *Robert Bell* and others his said masters as aforesaid against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity. And the

jurors aforesaid upon their oaths aforesaid do further present that *Elizabeth West* on the seventeenth day of *June* in the year of our Lord 1856 at *Manea* in the *Isle of Ely* aforesaid and within the jurisdiction aforesaid feloniously did receive five pounds in money of the monies goods and chattels of the said *Robert Bell* and others being part of the said ninety-five pounds in money above mentioned so as aforesaid feloniously stolen taken and carried away she the said *Elizabeth West* then well knowing the said monies goods and chattels to have been feloniously stolen taken and carried away against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

into the post-office at *Boston*. The prisoner *Frederick West* was a clerk in the said bank at *Wisbech*, and it was part of his duty to receive at the post-office at *Wisbech* every morning all letters addressed to the said bank there.

1856.

 WEST'S
Case.

On the day on which the envelope and enclosure should have been received by the bank at *Wisbech*, *Frederick West* received the letters as usual at the post-office, and he delivered on that day several letters (through a servant) to the manager of the bank, amongst which was a letter of advice from *Boston* of the transmission of the nineteen notes, but the envelope with its inclosure were not delivered with the other letters by the prisoner *Frederick West*, who denied all knowledge of the same.

The prisoner, *Frederick West*, subsequently paid to various persons several of the said notes; and the prisoner, *Elizabeth West*, paid away one of the said notes.

The jury returned a verdict against the prisoner, *Frederick West*, of guilty of stealing the said notes, and against the prisoner, *Elizabeth West*, of guilty of receiving one of the said notes knowing it to be stolen.

It was objected, on behalf of the prisoner *Frederick West*, that he could not be convicted, inasmuch as the indictment charged him with stealing "money;" and although the statute 14 & 15 *Vict. c. 100. s. 18.* enacts, "that in every indictment in which it shall be necessary to make an averment as to any money or any note of the *Bank of England* or any other bank, it shall be sufficient to describe such money or bank notes simply as money;" yet, as the notes were not at the time of the alleged stealing in circulation for value, but were in the hands of the bankers themselves, or in the course of transmission from one branch of the bank to another branch of the bank, they were not in fact bank notes (that is promissory

1856.

WEST'S
Case.

notes to pay), and not being bank notes they could not under the statute be designated by the substituted description of "money."

It was submitted on behalf of the prisoner, *Elizabeth West*, that if the prisoner, *Frederick West*, were not properly convicted of stealing the notes, the count against her for receiving one of such notes, knowing it to be stolen, must fail; and that she ought not to be convicted.

Judgment on the convictions against both prisoners was postponed, and they were both remanded to prison until the question arising on this conviction shall have been decided.

The opinion of the Court is prayed whether, upon this verdict, judgment ought to be given against both or either of the prisoners.

Wm. Gale Townley,

Chairman of the General Quarter Sessions for the *Isle of Ely*, held at *Ely* on the 15th *October*, 1856.

This case was considered on 15th *November*, 1856, by POLLOCK C. B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

Mills appeared for the Crown; no counsel appeared for the prisoner.

Mills, for the Crown, cited *Rex v. Ranson (a)*, in which it was held, by a majority of the Judges, that secreting a letter containing country bank notes paid in *London* and not re-issued, was within the repealed statute 7 *Geo. 3. c. 50. s. 1.* He was then stopped by the Court.

POLLOCK C. B.—We all think the conviction was right.

Conviction affirmed.

(a) 2 Leach, C. C. 1090; S. C. R. & R. C. C. 232.

REGINA v. SUSANNAH GREEN.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of the borough of *Bury Saint Edmunds*.

The prisoner was indicted at the *October Sessions* for the borough of *Bury Saint Edmunds*, for stealing two pair of women's boots, the property of *Rowland Britton*.

Rowland Britton was the son of *John Britton*, to whom the boots belonged, both of whom were examined as witnesses before the grand jury.

The mistake in the ownership being discovered before the grand jury were discharged, an acquittal was taken on this indictment and a fresh bill sent up describing the boots as the property of *John Britton*.

The grand jury having found their bill, the prisoner pleaded the following plea of *autrefois acquit*.

“ *Borough of Bury Saint Edmunds, 20th Oct. 1856.*

REGINA v. SUSANNAH GREEN.

“ And the said *Susannah Green* in her own proper person cometh into Court here, and having heard the said indictment read saith that our said Lady the Queen ought not further to prosecute the said indictment against the said *Susannah Green*, because she saith that heretofore, to wit at the General Quarter Sessions of the Peace holden at *Bury Saint Edmunds*, in and for the borough of *Bury Saint Edmunds*,

Prisoner was indicted for stealing a pair of boots the property of *A.*, and acquitted. She was then indicted again for stealing the same boots laid as the property of *B.*, and pleaded *autrefois acquit*. It appeared that *A.* was a boy 14 years of age living with and assisting *B.*, who was his father; that the boots were the property of *B.*, but that, at the time they were stolen by the prisoner, *A.* had temporarily in his father's absence the charge of the stall from which they were stolen. Held, 1. That *A.* was not a bailee, and that the ownership of the boots could not properly be

laid in him. 2. That the plea of *autrefois acquit* could not be sustained notwithstanding the power of amendment given by 14 & 15 Vict. c. 100.

1856. she the said *Susannah Green* was lawfully acquitted
GREEN'S of the said offence charged on the said indictment.
Case. And this she the said *Susannah Green* is ready to
verify ; wherefore she prays judgment, and that by
the Court here she may be dismissed and discharged
from the said premises in the present indictment spe-
cified ; and as to the felony and larceny of which the
said *Susannah Green* now stands indicted she the said
Susannah Green saith that she is not guilty thereof,
and of this the said *Susannah Green* puts herself upon
the country. “ *David Power.*”

Rowland Britton was then called, and examined by
the counsel for the prisoner.

He said he had made no charge of stealing any
goods of his own ; that the boots stolen were the pro-
perty of his father ; that up to one o'clock of the day
in question he had worked at the shop ; that he then
succeeded his father in charge of the stall, from
whence the goods were stolen, while he was in charge
his father returning home ; that he was fourteen years
of age, lived with his father, worked for him, assisted
him in his business and obeyed his orders ; that his
father supported him, but paid him no wages.

On his evidence it was contended by the prisoner's
counsel,

First. That *Rowland Britton* was a bailee of the
goods ; that they had been correctly described there-
fore in the first indictment as his property. That the
prisoner had therefore been in jeopardy on the first
indictment, and was entitled to be acquitted.

Secondly. That if the goods were not correctly de-
scribed as *Rowland Britton's*, that the indictment was
amendable under 14 & 15 *Vict. c. 100.*, and that the
prisoner ought not therefore to be placed a second
time upon her trial for what was in fact but one
offence.

I held that *Rowland Britton* was not under the circumstances a bailee, and that whether the indictment was amendable or not, (I thought not, as there appeared by the names indorsed on the back of the indictment to be a *Rowland Britton* as well as a *John Britton*, and that the grand jury had found the goods to belong to the former), no amendment having been made, the prisoner could not even have been convicted on the first indictment upon the evidence produced on the second, and that she had not therefore been in jeopardy.

The jury, however, under my advice, found a special verdict "that the goods in question were the property of *John Britton*, and were the same as those described in the first indictment as the property of *Rowland Britton*, and that there was but one and the same act of larceny."

I thereupon directed a verdict upon this plea to be entered for the Crown. The prisoner then pleaded over not guilty, was convicted and sentenced to nine months' imprisonment and hard labour.

Wm. Gurdon, Recorder.

This case was argued on the 15th November, 1856, before POLLOCK C. B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

D. Power appeared for the prisoner; no counsel appeared for the Crown.

Power, for the prisoner. Upon the evidence given upon the last indictment the prisoner might have been convicted upon the first. The boy *Rowland Britton* was a bailee of the goods at the time they were stolen. He had sufficient control over them to justify the ownership being laid in him. In *Reg. v. Taylor (a)*,

1856.

GREEN'S
Case.

(a) 1 Leach, 356.

1856.
 GREEN'S
 Case.

on an indictment for stealing a window glass and hammer-cloth from a carriage, it appeared that the prosecutor, in whom the property was laid, was a coach-master, and had the care of the carriage, which stood in a coach-house in his yard at the time the articles were stolen from it; and an objection that the property should have been laid in the owner of the carriage was overruled; and in a previous case, *Rex v. Statham (a)*, a prisoner was convicted under similar circumstances. The prisoner was, therefore, in peril on the first indictment.

But, secondly, he was in peril whether the goods were rightly or wrongly described in the first indictment as the property of *Rowland Britton*. Under section 1 of the 14 & 15 *Vict. c. 100.* the Court might have amended the indictment by substituting the name of *John Britton* for that of *Rowland Britton*. By the third section of the same statute the record shall be drawn up in the form in which the indictment was after the amendment was made, so that the prisoner would have been acquitted or convicted on the indictment first found by the grand jury, for an indictment amended is still the same indictment, as a coat repaired is still the same coat; and by section 2 of the same statute every verdict and judgment after amendment shall be of the same force and effect as if

(a) Referred to in the judgment in *Rex v. Taylor*, 1 Leach, 357, and see note at the end of that case. But the indictment will not be sustainable, if it appear in evidence that the party, in whom the goods are laid, had neither the property nor the possession of them, as is usually the case of a servant who has in his custody the goods of his master. See 2 East, P. C. c. 16. s. 90. pp. 652. 653; *Rex v.*

Hutchinson, Russ. & Ry. 412; *Regina v. Ashley*, 1 Car. & Kir. 198; but if a servant be employed by his master to receive money for him and be robbed of such money before he take it to his master, the money may be described as the money of the servant; *Regina v. Rudick*, 8 Car. & P. 237. As to the kind of special property which may exist in a servant; see *Rex v. Deakin and Smith*, 2 Leach, 862.

the indictment had originally been in the same form in which it was after such amendment was made. Therefore, as the acquittal took place upon an indictment which by an amendment might have been made the same as the second indictment, the prisoner has been twice in peril for the same offence, whether *Rowland Britton* was a bailee or not. He has been twice in peril of being convicted of the same act of larceny.

1856.

GREEN'S
Case.

POLLOCK C. B.—We are all of opinion that the conviction was right. The boy was not a bailee but a servant, and the plea of *autrefois acquit* cannot be sustained.

ERLE J.—The goods remained all the time in the father's possession, and could not have been laid as the property of the son. With reference to the plea of *autrefois acquit* we must consider what the indictment was and not what it might have been made. The Judge was not bound to amend. He did not amend, and the prisoner was acquitted upon an indictment upon which she was never in peril of a conviction.

The other learned Judges concurred.

Conviction affirmed.

1856.

REGINA v. CHARLES LISTER.

The prisoner was convicted of embezzlement. It was the prisoner's duty to receive remittances from the customers of his masters, to enter them to the credit of such customers in a day or cash book, and to enter the whole amount received by him on the credit side of a banker's deposit account, and to pay in the amount to the credit of the prosecutors with their bankers; and it was his duty afterwards to post the amounts in a ledger which contained the accounts of the different customers. The prisoner received a remittance which he appropriated to his own use. He made an entry of this amount in the

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Common Serjeant.

At a General Session of Gaol Delivery holden for the jurisdiction of the Central Criminal Court, on the 18th day of *August*, 1856, *Charles Lister* was tried and found guilty before me, upon an indictment for embezzling and stealing the sum of 10*l.* received by him by virtue of his employment, on account of *George William Potter* and another, his masters.

The prisoner was employed by the prosecutors to attend to the business of their journal, called *The County Paper*, and to receive remittances in money from their customers in connection therewith. When the prisoner received these remittances it was his duty to enter them to the credit of the customers, in a day or cash book. Before the next time of sending cash to the bankers, it was the prisoner's duty to make an extract from this cash or day book of all remittances received by him, as before mentioned, and which had not then been before paid to such bankers, and to take it to the general cashier of the prosecutors, in order that it might be compared with the book from which it purported to be an extract, so that thereby the amounts of remittances contained therein might be checked and ascertained to be correct. It then became the prisoner's further duty to enter the whole amount of money contained in such extract on the ledger to the credit of the customer, but he made no other entry of its receipt. *Held*, that the conviction was right as the entry made in the ledger did not exempt the prisoner from the operation of section 47 of 7 & 8 *Geo.* 4. c. 29.

1856.

LISTER'S
Case.

credit side of a banker's deposit account, and to pay such amount to the credit of the prosecutors with their bankers. The prisoner afterwards posted the amounts of money remitted by customers into a ledger which contained the accounts of the different customers. This was done by the prisoner at his own convenience. As the prisoner was entrusted from time to time to furnish receipts to the customers from whom he received remittances, he was supplied with a receipt book for that purpose, containing counterparts, on each of which it was his duty to enter the amount for which the corresponding receipt had been given. On the 7th *June* the money, the subject of this indictment, was remitted by a customer from the country. It was received by the prisoner, by virtue of his employment, on the 8th of *June*, and on the 9th of *June* he sent the customer a receipt for the amount in the usual course.

This sum the prisoner never entered in the cash or day book ; and, although he ought, in the regular course of his employment, to have included it in an amount which he paid to the credit of the prosecutors with their bankers on the 9th *June* following, he omitted to do so, nor was it entered in any subsequent account. It was, however, entered by the prisoner to the credit of the customer in the prosecutors' ledger. The money was applied by the prisoner to his own use.

The jury, with my full concurrence, found the prisoner guilty, subject to the following question, namely, Whether the entry made in the ledger exempts the prisoner from the operation of the statute 7 & 8 *Geo.* 4. c. 29. s. 47.; and it is under these circumstances that the opinion of the Court for the Consideration of Crown Cases is requested, in order

1856.

 LISTER'S
Case.

that such conviction may be subjected to the order of such Court. Judgment has been postponed on the prisoner, and he remains in gaol until the determination of this case.

Russell Gurney.

This case was argued on 15th *November*, 1856, before POLLOCK C. B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

B. C. Robinson appeared for the Crown, and *Metcalf* for the prisoner.

Metcalf, for the prisoner. By making the entry in the ledger the prisoner had accounted to his master, and was not guilty of embezzlement, which necessarily involves secrecy and concealment. *Regina v. Norman (a)*, *Regina v. Jones (b)*, *Rex v. Hodgson (c)*.

BRAMWELL B.—The entry in the ledger might have been made in order to deceive.

POLLOCK C. B.—Suppose he had entered it in all the books for that purpose?

Metcalf. The jury ought to have been asked whether this was in fact a fraudulent entry, or an entry made *bonâ fide* in the usual course of business.

POLLOCK C. B.—The only question we have to decide is, whether the making of the entry exempts the prisoner from the operation of the statute.

Robinson was not called upon by the Court.

POLLOCK C. B.—We are all of opinion that the conviction is quite right.

Conviction affirmed.

(a) Car. & Marsh. 501.

(b) 7 Car. & P. 833. 834.

(c) 3 Car. & P. 422.

REGINA v. EDWARD BAYLEY.

1856.

8 Cr Cr Cases 3

THE following case was stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of *Chester*.

The prisoner was tried and convicted before me at the last *July* Sessions for the city of *Chester* on a charge of embezzlement.

The first count of the indictment charged that the prisoner on, &c., being then employed as servant of the *Great Western Railway Company*, did, by virtue of his said employment, and while he was so employed, receive and take into his possession certain money to the amount of two shillings for and in the name and on the account of the said *Great Western Railway Company*, his masters, and that he embezzled the same. Another count (in respect of the same embezzlement) charged the prisoner as being the servant of the *Great Western Railway Company*, the *London and North Western Railway Company*, the *Chester and Holyhead Railway Company*, and the *Birkenhead, Lancashire, and Cheshire Junction Railway Company*, and as having received the money for and in the

A railway station was maintained at the joint cost of four companies whose lines met there, and was under the management of a committee of eight directors, two of whom were appointed by each company. This committee was called *The General Station Committee*, and appointed, dismissed, and paid out of a fund, contributed by the four companies, the cashier, the chief clerk, and other officers, clerks and

servants employed at the station; and out of that fund any loss by embezzlement of servants was made good to the particular company by whom such loss was suffered. The prisoner was a delivery clerk so employed, and it was his duty to deliver parcels arriving at the station by the trains of any of the four companies, and receive the charge for carriage and delivery; and to account for and pay over the sums received to the chief clerk, who paid them to the cashier of *The General Station Committee* to the account of the several companies to whom the same respectively belonged; the cashier keeping a separate account for each company, and paying over the money belonging to such company or to its bankers. The prisoner on delivering to the consignee a parcel brought by one of the said four companies appropriated part of the sum received for carriage and delivery, and accounted for the other part which according to the usual course of business was paid to the bankers of that company. *Held*, that in an indictment for embezzling the sum so appropriated the prisoner might be properly charged either as the servant of the four companies or as the servant of the committee.

1856. name and on the account of those four companies.

BAYLEY'S
Case.

A third count (in respect of the same embezzlement) charged him as being the servant of *John Williams* and seven other persons named, and as having received the money for and in the name and on the account of those eight persons; and a fourth count (in respect of the same embezzlement) charged him as being the servant of *Robert Lewis Jones*, and as having received the money for and in the name and on the account of the said *Robert Lewis Jones*.

There were two other similar sets of counts in respect of two other subsequent acts of embezzlement.

It appeared from the evidence that the General Railway Station at *Chester* was built upon land in part belonging to each of the four railway companies whose lines of railway, at the time when it was built, ran through or into *Chester*—namely, the *London and North Western*, the *Shrewsbury and Chester* (since amalgamated with the *Great Western*), the *Chester and Holyhead*, and the *Birkenhead, Lancashire, and Chester Junction* railway companies; that the station is maintained at the joint cost of the above mentioned companies (except that the *Great Western* is now in the place of the *Shrewsbury and Chester*,) out of a fund contributed by them in certain agreed proportions; and that it is under the management of a committee of eight gentlemen, directors of these four companies, being the persons named in the count thirdly above mentioned, two of whom are appointed by each company, and who are called “*The General Station Committee*.” This committee appoints, dismisses, and pays out of the fund above mentioned the wages of the officers, clerks, and other servants who are employed at the station. Amongst these are the “delivery clerks,” whose duty it is to deliver to persons in the city of *Chester* and its neighbourhood

parcels which arrive at the station by the trains of any of the four companies addressed to such persons, to receive from them the sums charged for the carriage and delivery of such parcels, and on the night of the same day to account for and pay over to the "chief clerk in the parcel office" the total of the sums so received by them during the day. For the performance of this duty each of the delivery clerks has given to him each morning a "delivery book," into which, before the parcels are handed to him for delivery, the particulars of them are copied in the parcel office from the several "way bills" of the trains by which they were brought to the station. The chief clerk of the parcel office each night gives the delivery clerk a receipt in his delivery book for the money actually paid over by him in respect of the day's receipts, and any monies due for parcels delivered on that day, which the delivery clerk has not been able to collect, are carried forward in his delivery book as a balance to the account of the next day. The chief clerk of the parcel office, on the same day, pays over the monies so received by him to the "cashier" of *The General Station Committee* to the account of the several companies to whom the same respectively belong. The cashier keeps a separate account for each company, and on the same day pays the money over directly to the company to which it belongs or to its bankers. The cashier and chief clerk of the parcel office are appointed, paid, and dismissed by *The General Station Committee* in manner hereinbefore mentioned. On the morning of the 26th of *February*, 1856, two parcels came from *London* by the train of the *Great Western Railway Company* to the *Chester* station, addressed to Messrs. *Prichard & Roberts*, booksellers, *Chester*, on which, according to the way bill, there were the sums of five shillings and one

1856.

BAYLEY'S
Case.

1856.

BAYLEY'S
Case.

shilling and sixpence respectively "to pay" for the carriage of them. These parcels, with many others, were on that morning given to the prisoner for delivery, the particulars thereof having been entered from the way bills in his delivery book in the manner above described.

The total amount "to pay" for parcels to be delivered by the prisoner on that day was 2*l.* 14*s.* 11*d.*; the total amount which was accounted for in the delivery book, and paid over by him in respect of that day's delivery, was 1*l.* 12*s.* 7*d.*, the balance, 1*l.* 2*s.* 4*d.*, being carried forward to the next day. The prisoner received from Messrs. *Prichard & Roberts* the sums of five shillings and one shilling and sixpence in respect of their said parcels, but the sums which at the time of such accounting and payment appeared on the face of the delivery book as having been charged to and received in respect of these parcels were three shillings and one shilling and sixpence, the three shillings having been written by the prisoner on an erasure of the five shillings, and the 1*l.* 12*s.* 7*d.* was accordingly less by two shillings than the actual amount received by the prisoner on that day.

Similar evidence was given with respect to other parcels, which also came by trains of the *Great Western Railway Company*, and were delivered by the prisoner to other persons in *Chester* on two subsequent days.

The chief clerk of the parcel office paid over, on the same day, the monies received by him from the prisoner in respect of these parcels to the cashiers of *The General Station Committee*, and the cashiers on the same day paid the same to the bankers of the *Great Western Railway Company* to the account of that company.

Mr. *Robert Lewis Jones* is the "general manager" at the *Chester* station, and he also is appointed and paid by *The General Station Committee*. He had not any power of appointing or dismissing any of the officers or servants employed at the station.

1856.

 BAYLEY'S
Case.

Mr. *Jones* stated in his evidence, that in cases of loss by the negligence or embezzlement of a "station servant," the usage had been to make good the loss to the particular company by whom it was suffered out of the funds of *The General Station Committee*; that losses by negligence had thus been very frequently made good, and losses by embezzlement on three or four occasions. The fund out of which these losses are made good is a different fund from that which is in the cashier's hands for payment over to the several companies or their bankers', as before mentioned; it is in the hands of Messrs. *Dixon & Wardell*, bankers, of *Chester*, as the bankers of *The General Station Committee*, and is drawn out by cheques signed by the general manager.

Upon this state of facts it was objected by the prisoner's counsel, that no count of the indictment was supported by the evidence, for that the prisoner was not the servant of the *Great Western Railway Company*, or of the four companies, or of Mr. *Jones*, and that if he was the servant of *The General Station Committee* he did not receive the monies alleged to have been embezzled by him for and on account or in the name of that committee, but for and on account and in the name of the *Great Western Railway Company*. *Regina v. Townsend* (a) and *Regina v. Beaumont* (b) were cited.

I reserved these objections for the decision of this

(a) 1 Den. C. C. 167.

(b) Dears. C. C. 270.

1856.

BAYLEY'S
Case.

Court, and left it to the jury to say whether the prisoner had fraudulently retained to his own use the sums which he had received over and above those which he had accounted for and paid over. The jury found the prisoner guilty of all the charges alleged in the indictment, and thereupon I respited the sentence and admitted him to bail until the judgment of this Court should have been given upon the points reserved.

The question which I respectfully submit for the decision of this Court therefore is, whether any of the counts of the indictment was supported by the evidence?

Oct. 27, 1856.

W. N. Welsby,
Recorder of *Chester*.

This case was considered on 15th *November*, 1856, by POLLOCK C. B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

No counsel appeared for the prisoner.

Parry, Serjt. (with him *Horatio Lloyd*) appeared for the Crown, but was stopped by the Court.

POLLOCK C. B.—We are all of opinion that the prisoner may be considered either as the servant of the four companies or as the servant of the committee.

Conviction affirmed.

list 164

REGINA v. HARRIETT WILSON.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by COLERIDGE J.

This prisoner was tried before me at the *Hertford* Spring Assizes upon an indictment framed on the 1st *Vict.* c. 85. s. 6., for “unlawfully administering to and causing to be taken” by one *Emma Cheney* certain poison (in the second count stated to be a certain noxious thing), with intent to procure her miscarriage. It was proved that *Emma Cheney*, being and believing herself to be pregnant, applied to the prisoner to get her something to procure miscarriage. The prisoner asked her for two pence, and promised she would. She accordingly purchased some preparation of mercury, which she gave to her, directing her to take one-half of the quantity in gin. *Emma Cheney*, accordingly, some little time after, and not in the prisoner’s presence, procured the gin and took the dose, which, in a few days, produced miscarriage, and made her so ill as to bring her life into danger. The jury found these facts, and that the mercury was both given to *Emma Cheney* by the prisoner, and taken by her with intent to procure the miscarriage. I directed a verdict of guilty on this finding; but doubting whether the charge of “administering” or “causing to be taken” was proved on this evidence, I suspended the sentence and bailed the prisoner; and I now desire the opinion of the Judges on this question.

J. T. COLERIDGE.

The prisoner was convicted on an indictment, under section 6 of 7 Wm. 4. and 1 Vict. c. 85, for administering and causing to be taken by *E. C.* certain poison with intent to procure her miscarriage. It appeared that *E. C.* being pregnant applied to the prisoner to get her something to procure miscarriage, and that the prisoner did procure a drug which drug was given by the prisoner to *E. C.*, and taken by her with intent to procure, and did in fact procure miscarriage; but that the taking by *E. C.* was not in the presence of the prisoner. *Held*, that the conviction was right inas-

much as there was a “causing to be taken” within the meaning of the statute.

1856.

WILSON'S
Case.

This case was argued on the 3rd day of *May*, 1856, before JERVIS C. J., COLERIDGE J., WIGHTMAN J., CRESSWELL J. and MARTIN B.

Carrington appeared for the Crown; no counsel appeared for the prisoner.

Carrington, for the Crown. The statute (7 *Wm.* 4 & 1 *Vict.* c. 85. s. 6.) enacts, "that whosoever, with intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing" shall be guilty of felony. The whole question turns on the meaning of the words "unlawfully administer to her, or cause to be taken by her." Here, no doubt, the woman took the drug in the absence of the prisoner, and knew what it was when she took it; and it is therefore said that there was no administering by the prisoner, and that she did not cause the drug to be taken by the woman, but that all she did was to give the woman the means of taking it.

JERVIS C. J.—He who does an act by means of an innocent agent commits the act himself. May it not be here said that the woman was an innocent agent? She committed no offence against the law.

COLERIDGE J.—Not innocent. She is guilty of a misdemeanor, but not of the statutable felony.

MARTIN B.—What does the act mean? That there shall be compulsion?

Carrington. In the great majority of cases the woman is consenting.

JERVIS C. J.—The same section makes it a felony to use instruments which could not be used without the consent of the woman.

Carrington. Administering is said by Dr. *Johnson* to mean "to give, to afford, to supply;" and here the prisoner did give, afford, and supply the drug to the woman.

In *Rex v. Cadman* (a) the defendant gave the prosecutrix a cake containing poison, which she merely put into her mouth and spit it out again, and did not swallow any part of it; and it was holden that the mere delivery to the woman did not constitute an administering within the meaning of the statute, although, according to the report in *Moody's Crown Cases*, the Judges seemed to think that swallowing it was not essential. However, in the case of *Rex v. Harley* (b) Park J., who was one of the Judges who decided the case of *Rex v. Cadman*, stated that some error must exist with regard to that case, and that it was essential to the offence of "administering" that the thing must be swallowed; but in *Rex v. Harley* it was held that it is not necessary that there should be an actual delivery by the hand of the accused.

These two cases were not decided upon the present statute. The indictment in *Rex v. Cadman* was framed upon the first section of 43 Geo. 3. c. 58. (c), and in *Rex v. Harley* the indictment was upon the eleventh section of 9 Geo. 4. c. 31. (d). Under those

1856.

 WILSON'S
Case.

(a) 1 Moo. C. C. 114.

(b) 4 Car. & P. 369.

(c) That part of the section on which the indictment was founded declares it to be a felony, if any person or persons "shall wilfully maliciously and unlawfully administer to or cause to be administered to or taken by any of his Majesty's subjects any deadly poison or other noxious and destructive substance or thing with intent such his Majesty's subject or subjects thereby to murder or thereby to cause and procure the miscarriage of any woman then being quick with child."

(d) That section is as follows:—"That if any person unlawfully and maliciously shall administer or

attempt to administer to any person or shall cause to be taken by any person any poison or other destructive thing or shall unlawfully and maliciously attempt to drown suffocate or strangle any person or shall unlawfully and maliciously shoot at any person or shall by drawing a trigger or in any other manner attempt to discharge any kind of loaded arms at any person or shall unlawfully and maliciously stab cut or wound any person with intent in any of the cases aforesaid to murder such person every such offender and every person counselling aiding or abetting such offender shall be guilty of felony and being convicted thereof shall suffer death as a felon."

1856. statutes it was not a felony unless the woman was pregnant, *Rex v. Scudder* (a); but in this statute the felony consists in the administering or causing to be taken with intent to procure the miscarriage of *any woman*. I further submit, that in this case there was a causing to be taken, and not the less so because the person who took the drug knew what it was. A medical man does not the less cause me to take medicine because I know what the medicine is and take it in his absence.

WILSON'S
Case.

CRESSWELL J.—In *Regina v. Williams and Rees* (b) where two persons sent a third to a public house with poison, informing him that it was poison, and that they wanted to kill certain persons at the public house, and directed him to administer the poison to those persons, they were held not to be guilty of an attempt to administer the poison. The ground of the decision appears to have been, that if the poison had been administered the person sent would have been the sole principal felon, and the prisoners would only have been accessories before the fact. In the present case, the party taking the drug was not thereby committing a felonious act.

Carrington. Here there can be no accessory before the fact, and there can be no principal except the person who administers the drug. In *Regina v. Williams and Rees* there was no count in the indictment which related to “causing to be taken,” all the counts having relation to the offence of attempting to “administer.”

Cur. adv. vult.

At the sitting of the Court on 15th November, 1856, COLERIDGE J., addressing *Carrington*, stated, that

(a) 1 Ry. & M. C. C. 216; S. C. 3 Car. & P. 605.

(b) 1 Den. C. C. 39; S. C. 1 Car. & K. 589.

owing to the decease of *Jervis C. J.*, it was necessary that the case should be argued again; and accordingly on the 22nd *November*, 1856, the case was again considered by *POLLOCK C. B.*, *COLERIDGE J.*, *WILLIAMS J.*, *WILLES J.* and *WATSON B.*

1856.

WILSON'S
Case.

Carrington appeared for the Crown, but was stopped by the Court.

POLLOCK C. B.—This case was ordered to be re-argued, on account of the lamented death of the late Chief Justice of the Common Pleas; but it will not be necessary to hear the learned counsel for the prosecution, as we are all of opinion that there was a “causing to be taken,” within the meaning of the statute, and that the conviction is right.

Conviction affirmed.

REGINA v. JOHN SPENCER AND MARY DAVISON.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal, by *BRAMWELL B.*

The prisoners were indicted and convicted before me at the last assizes for the county of *York*, on an indictment founded on the statute 7 *W. 4* & 1 *Vict. c. 89. s. 10. (a)*, which charged them with unlawfully

The prisoners were convicted on an indictment charging them with unlawfully and maliciously setting fire to a stack of grain. The stack in question was of

the flax plant with the seed or grain in it, and the jury found that the flax seed is a grain. *Held*, that the stack was a stack of grain within sect. 10 of 7 *Wm. 4* & 1 *Vict. c. 89.*

(a) The section enacts, “that whosoever shall unlawfully and maliciously set fire to any stack of corn, grain, pulse, tares, straw, haulm, stubble, furze, heath, fern, hay, turf, peat, coals, charcoal or wood, or any steer of wood, shall be guilty of felony.”

1856.
SPENCER'S
Case.

and maliciously setting fire to a stack of grain. The stack in question was of the flax plant, with the seed or grain in it. The jury found that the flax seed is a grain. Entertaining doubts whether the stack was a stack of grain within the act of Parliament, I reserved the question for the consideration of the Court of Criminal Appeal. The prisoners were not sentenced.

This case was considered on 22nd *November*, 1856, by POLLOCK C. B., COLERIDGE J., WILLES J., BRAMWELL B. and WATSON B.

No counsel appeared either for the Crown or for the prisoners.

Per CURIAM.—The conviction is right.

Conviction affirmed.

1856.

REGINA v. HENRY MANWARING.

The prisoner was convicted on an indictment for bigamy. It was alleged

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by WIGHTMAN J.

that the first marriage took place in a dissenting chapel duly licenced for marriages, and a witness was called who proved that he was present at the marriage, that it took place in the dissenting chapel in the presence of the registrar, that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties afterwards lived together as man and wife for some years. *Held*, 1. That the parol testimony of the witness sufficiently proved the fact of marriage. 2. That there was *primâ facie* evidence that the chapel was duly registered, and was a place in which marriages might legally be solemnized.

A witness produced a certificate, under the hand of the superintendent registrar, of the fact that the chapel had been duly registered. It did not purport to be a copy or extract, but the witness proved that he had examined it with the register book at the office of the superintendent registrar, and that it was correct. *Held*, per POLLOCK C. B. and WILLES J., that the document was admissible as an examined copy or extract from the superintendent registrar's book, under section 14 of 14 & 15 *Vict. c. 99.*, and was therefore good evidence of the due registration of the chapel.

The prisoner was tried before me at the last *Staffordshire* Assizes for bigamy, he having, as it was alleged, on the 23rd of *July*, 1848, married one *Eliza Goodman* in a *Wesleyan* Chapel duly licenced for marriages, and afterwards, and in her lifetime, married one *Elizabeth Outley* on the 25th of *December*, 1855.

1856.

MANWAR-
ING'S
Case.

To prove the first marriage a witness was called who stated that he was present at the marriage of the prisoner with *Eliza Goodman* at the *Wesleyan* Chapel at *Dunstable* on the 23rd of *July*, 1848, [in the presence of the registrar] (a), and signed the register as a witness, and that they lived together as man and wife for two or three years.

A witness was then called who proved that a certificate, of which a copy is annexed, marked A., was examined by him with the register book, kept at the office of the superintending registrar at the *Union Workhouse* at *Luton*, *Dunstable* being within the district of *Luton*, and that it was correct, and that it was signed by the superintending registrar of the district.

The same witness stated that he examined another certificate which he received from the superintending registrar (a copy of which, marked B., is also annexed), with the register book at his office, and that it was correctly extracted, and that it was signed by the superintending registrar of the district, from whom he received it, in his presence.

The same witness also produced another document (a copy of which, marked C., is also annexed), which he received from the superintending registrar and

(a) The case was amended on the hearing by the insertion of the words in brackets.

1856. which he signed in his presence, and which he said
 MANWAR- he examined with the register at his office and found
 ING'S that it was correctly extracted.
 Case.

The reception of these documents was objected by the prisoner's counsel, on the ground that certificates were not admissible at all to show a marriage in a *Wesleyan Chapel*, or that it was a place in which marriages could be legally solemnized, or that, if admissible, they must be authenticated by the official seal of the registrar and not under hand only, and the following statutes were referred to.—6 & 7 *Wm. 4. c. 85.* ; 6 & 7 *Wm. 4. c. 86.* ; 1 *Vict. c. 22.* ; 3 & 4 *Vict. c. 92.* ; 8 & 9 *Vict. c. 113.* ; 9 & 10 *Vict. c. 119.* ; 14 & 15 *Vict. c. 99.*

As the case, as it appeared at the trial, was one of great aggravation, and the objection was to the mode of proof, involving points of considerable nicety and importance, as regarded the sufficiency of documentary evidence of marriages in licenced dissenting chapels, I admitted the documents, and allowed the case to proceed upon the assumption that there was evidence of the legality of the prior marriage, and the prisoner was found guilty.

The question is, whether the before mentioned documents, marked respectively A. B. and C., or any of them, were receivable in evidence ; and if any of them were, whether such document or documents so admissible, with the evidence of the witness present at the alleged marriage at *Dunstable*, as before stated, afforded evidence of the prior marriage sufficient to sustain the conviction.

WM. WIGHTMAN.

1856.

A. CERTIFICATE OF MARRIAGE.
Book, No. 1, page 85.

1848. Marriage Solemnized in the *Wesleyan Chapel, Dunstable*, in the District of *Luton*, in the Counties of *Bedford* and *Hertford*.

1848. Marriage Solemnized in the <i>Wesleyan Chapel, Dunstable</i> , in the District of <i>Luton</i> , in the Counties of <i>Bedford</i> and <i>Hertford</i> .								
No.	When Married.	Name and Surname.	Age.	Condition.	Rank or Profession.	Residence at the time of Marriage.	Father's Name and Surname.	Rank or Profession of Father.
169	Twenty-third <i>July</i> 1848	<i>Henry Manwaring</i> <i>Eliza Goodman</i>	22 years 21 years	Bachelor Spinster	Painter —	<i>Dunstable</i> <i>Dunstable</i>	<i>Henry Manwaring</i> <i>Joseph Goodman</i>	Printer Carpenter

Married in the *Wesleyan* Chapel according to the Rites and Ceremonies of the *Wesleyan* Methodists.

This marriage was solemnized between us { *Henry Manwaring* } In the pre- { *Thomas Wallis* } By me " *Wright Shovelton*."
 { *Eliza Goodman* } sence of us { *William Bunn* } { *William Alfred Southam*, Registrar.

I certify the above to be a correct copy,

Thos. Erskine Austin, Registrar.

Luton, March the seventh 1856.

T. E. A.

1856.

MANWAR-
ING'S
Case.

B.

I, the undersigned, *Thomas Erskine Austin*, Superintendent Registrar of the district of *Luton*, in the counties of *Bedford* and *Hertford*, do hereby certify, that the *Wesleyan Chapel*, situate at *Dunstable*, in the county of *Bedford*, was duly registered for the solemnization of marriages therein, pursuant to the Act, 6 & 7 Wm. 4. c. 85., on the twenty-eighth day of *November*, in the year one thousand eight hundred and forty-five. Given under my hand this twenty-sixth day of *March*, one thousand eight hundred and fifty-six.

Thos. Erskine Austin.

Superintendent Registrar.

C.

Harry Manwaring and *Eliza Goodman* were married after notice, read at the Board of Guardians of the *Luton Union*, without licence.

Thos. Erskine Austin,

Luton, 26th March, 1856.

This case was argued on 22nd *November*, 1856, before POLLOCK C. B., WIGHTMAN J., WILLIAMS J., WILLES J. and WATSON B.

M' Mahon appeared for the Crown, and *G. Browne* for the prisoner.

G. Browne, for the prisoner. The documents were inadmissible. As to the document marked A., in order to be admissible, it ought to have been a certified copy under the seal of the register office, in pursuance of section 38 of 6 & 7 Wm. 4. c. 86., which enacts, that "all certified copies of entries purporting

to be sealed or stamped with the seal of the register office shall be received as evidence of the birth, death or marriage to which the same relate without any further or other proof of such entry ; and no certified copy purporting to be given in the said office shall be of any force or effect which is not sealed or stamped as aforesaid."

1856.

MANWAR-
ING'S
Case.

WIGHTMAN J.—A witness proved that that certificate was examined by him with the register book, kept at the office of the superintendent registrar, and that it was correct ; so that it was not merely a certificate but an examined copy.

POLLOCK C. B.—The marriage was proved by a witness who was present. The certificate can do no harm.

WIGHTMAN J. stated that the marriage took place in the presence of the registrar, and, the counsel on both sides assenting, the case was amended by inserting that fact therein.

WILLIAMS J.—To prove a marriage in the Church of *England*, the production of a certificate is unnecessary when the evidence of a person who was present can be obtained.

G. Browne. The marriage in this case not having been in a building belonging to the Church of *England*, it was necessary to prove that the place in which it was celebrated was duly registered. In order to prove that, the document B. was put in, but that I contend was inadmissible. The mode of registration is pointed out by section 18 of 6 & 7 *Wm.* 4. c. 85.

The registration could not be proved by parol evidence, and if provable in any way, except by the production of the book kept in the office of the superintendent registrar, in which it is his duty to

1856.
 MANWAR-
 ING'S
 Case.

make the entry of registration, it must have been by virtue of section 14 of 14 & 15 *Vict. c. 99. (a)*; but the document B. purports to be a certificate by the superintendent registrar that the chapel was duly registered. It is not an examined copy nor does it purport so to be, but it is only a certificate not made evidence by any statute, and was therefore clearly inadmissible.

POLLOCK C. B.—The witness says it is a true extract from the registrar's book.

WIGHTMAN J.—It does not purport to be a copy of anything, nor does it pretend to state the terms in which the building was registered. It is a certificate of a fact.

G. Browne. It is clear on the face of the document that it is not a copy or extract. Then it does not even show that the building continued registered as a place for marriages. If the book had been produced it may be that a cancellation of the registration would have been shown.

WIGHTMAN J.—If there is *prima facie* evidence that the building was once registered, the prosecutor was not bound to show that the registration had not been cancelled. A cancellation can hardly be presumed, in the face of the fact, that marriages were continuing to be solemnized there, and that it would be an offence to celebrate marriages in an unregistered

(a) That section enacts, that "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, *any copy thereof or extract therefrom shall be admissible in evidence in*

any Court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, *provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified, as a true copy or extract, by the officer to whose custody the original is intrusted.*"

place. The assumption is, that the building continued to be registered ; but the prisoner might have shown that the registration was cancelled, if the fact were so.

1856.

MANWAR-
ING'S
Case.

G. Browne. At all events the original registration must be proved in order to show a legal marriage. The mere proof of the fact, that a ceremony was gone through with the intention of contracting a marriage, is not sufficient. An indictment for bigamy cannot be sustained on evidence which would not support a civil action ; and it has been decided that the plaintiff, in an action for crim. con., is bound to prove a marriage valid in all respects ; and that it is not sufficient *prima facie* evidence on his part to show that he and his alleged wife went through a religious ceremony with the *bona fide* intention of thereby contracting a valid marriage, and afterwards lived together as man and wife, in the belief that they had thereby contracted a valid marriage, if in law such marriage was not valid ; *Catherwood v. Caslon (a)*. It was there held that a marriage between *English* subjects, celebrated according to the rites of the Church of *England*, but not in the presence of a priest in holy orders, is invalid at the common law ; and *Parke B.*, in delivering judgment, said, “ that if the woman under such circumstances married again, she could not be convicted of bigamy.” So, here, if the marriage was celebrated in a place not duly registered it was invalid, and the defendant could not be convicted.

WILLES J.—The decision in *Catherwood v. Caslon* turned upon *Regina v. Millis (b)*, which I shall never consider as a binding authority.

(a) 13 Mee. & W. 261.

(b) 10 Cl. & F. 534. In that case Lord Brougham, Lord Denman

and Lord Campbell were of opinion that there was such a marriage as would support an indictment for

1856.

 MANWAR-
ING'S
Case.

G. Browne. In *Regina v. Bowen (a)*, it was held by *Platt B.*, that proof that marriages had been solemnized in a chapel for twenty years was not sufficient to show that the chapel was one in which marriages might be lawfully solemnized.

With regard to the document marked C., there is nothing in any of the statutes to authorize its reception in evidence.

M' Mahon, for the Crown. It was only necessary on the part of the prosecution to prove a marriage in fact; and a marriage in the presence of the registrar was proved. The document marked A. was a certificate, which the registrar was bound to give by sections 35 and 38 of 6 & 7 Wm. 4. c. 86. In *The Queen v. Hawes (b)*, where the first marriage was solemnized under the provisions of 6 & 7 Wm. 4. c. 85., the certificate authorized by that Act and 6 & 7 Wm. 4. c. 86. s. 38., coupled with the identity of the parties, was held to be sufficient *prima facie* evidence of such marriage.

This document was an examined copy of an original entry, which the registrar was bound by statute to make, and was therefore admissible.

Then there is abundant evidence that the chapel was duly registered as a place for the celebration of marriages. The document B. is proved to be a correct abstract from the book of the superintendent registrar, and it is therefore admissible as an examined copy. That alone would be sufficient evidence of registration; but that fact is well established, without the aid of that document, by the witness, who proves

bigamy; and the Lord Chancellor (Lord Lyndhurst), Lord Cottenham and Lord Abinger that there was not. The Lords being thus divided the rule "*semper præsuntur pro*

negante" applied, and judgment was given for the defendant in error.

(a) 2 Car. & Kir. 227.

(b) 1 Den. C. C. 270.

that the marriage was celebrated in the presence of the registrar, and duly entered in the register book. In the case of a marriage in a parish church, the marriage is well proved by a person present at it, and it is not necessary to prove the registration or licence or banns; *Rex v. Allison (a)*, *Rex v. James (b)*. In this case the registrar and the other parties would have been guilty of an offence against the law, if the marriage had taken place in an unregistered building; and the presumption is, that the parties were acting legally.

The learned counsel was stopped by the Court.

G. Browne replied.

POLLOCK C. B.—The fact of the marriage is established by the evidence of the witness, and the case being considered as amended by the introduction of a statement that the registrar was so present thereat, the only other matter to be considered is, whether the place in which the marriage was solemnized was one in which by law a marriage might legally take place. In order to prove that, the document marked B. was produced on the part of the prosecution. That document is a certificate under the hand of the superintendent registrar, that the *Wesleyan* Chapel, situate at *Dunstable*, was duly registered for the solemnization of marriages, pursuant to 6 & 7 *Wm.* 4. c. 85. This document is not in the most correct form, and appears on the face of it open to the objection taken by *Mr. Browne*, that it does not purport to be an examined copy or abstract, but is merely a certificate of the fact that the place is registered. I will not say whether I consider that objection well founded; it is unnecessary that I should do so, because a witness was called, who stated not only that he received the

1856.

MANWAR-
ING'S
Case.

(a) *Russ. & Ry.* 109.

(b) *Ibid.* 17.

1856.

MANWAR-
ING'S
Case.

certificate from the superintendent registrar, but that he examined it himself with the register book at the registrar's office, and that it is correctly extracted therefrom. That evidence comes to this, that the witness found in the book the words, "The Wesleyan Chapel, situate at *Dunstable*, in the county of *Bedford*, was duly registered for the solemnization of marriages therein, pursuant to the Act, 6 & 7 Wm. 4. c. 85., on the twenty-eighth day of *November*, in the year one thousand eight hundred and forty-five;" and then, leaving out the unnecessary words at the beginning and at the end of the document, it must be taken to be an examined copy or extract from the registrar's book, and it consequently proves that the chapel was duly registered. The conviction therefore was right, and must be affirmed.

WIGHTMAN J.—I must own that at the trial I entertained considerable doubt as to the admissibility of the document B., and still more as to the document C.; and I still have considerable doubts. But independently of those documents, I think that there was *prima facie* evidence that this chapel was duly registered, and was therefore a place in which marriages might be legally solemnized. The presence of the registrar at the marriage, the fact of the ceremony taking place, and the entry in the registrar's book, of which a copy was produced at the trial, seemed to me at the time to be circumstances which afforded, and I now think, aided as they are by the presumption *omnia rite esse acta*, they do afford, *prima facie* evidence that the chapel was a duly registered place in which marriages might be legally celebrated. If it were not such a place all those who took part in the proceedings would be criminally liable for doing so.

WILLIAMS J.—I am of the same opinion. On the case, in its corrected form, there is evidence of the

marriage, and that it took place under such circumstances that the person who was present and acted as registrar was authorized to do so, if the chapel was duly registered; but if the chapel was not duly registered his conduct would have been illegal. We must presume that the registrar was acting legally and not illegally; and, that being so, it becomes unnecessary to decide as to the admissibility of document B.; but I must protest against it being supposed that I agree in the notion that, when a document of a public nature cannot be produced, the parties are tied down to any particular mode of secondary proof.

WILLES J.—I am of the same opinion. Whether public documents stand upon the same footing as private documents with respect to the mode of proof, is a question of great importance. In *Mortimer v. M'Callan* (a), it is laid down as established law, that with reference to the books of the *Bank of England* copies of them are receivable in evidence. An opinion seems to have prevailed, which is referred to by Mr. *Best* in his valuable book on the *Principles of Evidence*, that a public document should be evidenced by a copy, on the ground that it is kept in a known

1856.

MANWAR-
ING'S
Case.

(a) 6 Mee. & W. 58. The reason given by Lord *Abinger* is, that those books being of great concernment to the whole of the national creditors, the removal of them would be so inconvenient that copies of them might be received in evidence; *Alderson B.*, in his judgment in the same case, says: "The bank books are not capable of being produced without so much public inconvenience that the Courts have directed them to remain in the bank, and copies of them to be received in evidence for the purpose for which

the books are receivable. Then, if they are not removable on the ground of public inconvenience, that is, on the same footing in point of principle, as in the case of that which is not removable by the physical nature of the thing itself. Inscriptions upon tombstones or on a wall are proved every day in this way for that reason. The necessity of the case in the one instance, and in the other the general public inconvenience which would follow from the books being removed, supplies the reason of the rule."

1856.

MANWAR-
ING'S
Case.

place, and that everyone may inspect it and obtain a copy of it; but it is not now necessary to decide whether that distinction is correct or not. It is a mistake to suppose that the provisions of 14 & 15 Vict. c. 99. s. 14. are anything more than cumulative, or that they give a rule and the only rule of evidence; but by that section a copy of or an extract from such a book as this is admissible in evidence, provided it be proved to be an examined copy or extract. Well, is this proved to be an examined copy or extract? The witness says that he examined the certificate marked B. with the register book at the office of the superintending registrar, and that it is correctly extracted therefrom; and that certificate says that the building was duly registered on a certain day. What more can we require? I think that that document was properly admitted, and if so, the statute is satisfied; but if not, it is admitted that the marriage took place in the presence of the registrar and was duly registered; and that was evidence (even by way of admission on the part of the prisoner) that the marriage was legally solemnized.

WATSON B.—I also think the conviction must be affirmed. I do not found my opinion upon the admissibility of document B., although I am strongly inclined to think that it was properly admitted in evidence; but my opinion is founded on the evidence of the witness who was present at the marriage, and who proved that it took place in the presence of the registrar and was duly entered in the register. It is to be presumed *omnia rite esse acta*, and that the marriage was a legal marriage and in a place where such marriage might legally be solemnized.

Conviction affirmed.

S.C. 7 Cox 217.

REGINA v. JOHN KEIGHLEY.

1856.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Chairman of the Sessions for the West Riding of the county of *York*.

The defendant was tried at the adjourned Sessions, held at *Wakefield* on the 28th day of *August*, 1856, and convicted on the count in the indictment set forth below.

West Riding of *Yorkshire* to wit. The jurors for our Lady the Queen upon their oath present that *John Keighley* late of *Wakefield* in the west riding of the county of *York* labourer on the eighteenth day of *April* in the year of our Lord 1856 at *Bradford* in the said west riding of the county of *York* unlawfully knowingly and designedly did falsely pretend to one *David Balmford* that a certain horse which he the said *John Keighley* then had at the *Nelson Inn* in *Bradford* in the riding aforesaid was sound and that he the said *John Keighley* would warrant him to any body and that the said horse was as sound as it was possible for a horse to be that he the said *John Keighley* came from *Otley* and that he was a farmer at *Otley* and that a certain person

An indictment charged, that the defendant knowingly falsely pretended that a horse was sound, and that he himself was a farmer at *O.*, negativing both pretences in the usual way. The defendant was convicted, but a case reserved in which, after stating that the various allegations in the indictment were proved, and that the defence was that this was a case of giving a false warranty, and therefore not indictable, the question was put, whether the conviction could be sustained?

The Court having directed an amendment of the case, the facts proved at the trial were set out more specifically, but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated, from which that inference might be drawn; nor was it stated what direction the chairman had given to the jury.

Held, that, as the case was framed, the conviction must be quashed; as the Court, not knowing what direction had been given to the jury, could not answer the question put to it in the affirmative; and as it was consistent with the case that the jury might have been told, that even if the defendant did not know that the horse was unsound, he might be convicted upon the other false pretence alone.

1856. then and there with him whom he called *Ben* was
KEIGHLEY'S his man and that he *Ben* had worked the horse for
Case. a month by means of which said false pretences the
said *John Keighley* did then and there unlawfully
obtain from the said *David Balmford* a certain horse the
property of him the said *David Balmford* and others
his partners and also the sum of nine pounds and ten
shillings of the monies goods and chattels of him the
said *David Balmford* and others his said partners
with intent to defraud whereas in truth and in fact
the said horse was not then sound nor was it then as
sound as it was possible for a horse to be as alleged
by the said *John Keighley* and as he the said *John
Keighley* well knew and whereas in truth and in fact
the said *John Keighley* did not then come from *Otley*
and was not then a farmer at *Otley* to the great
damage and deception of the said *David Balmford*
to the evil example of all others in the like case
offending against the form of the statute in such case
made and provided and against the peace of our Lady
the Queen her Crown and dignity.

There was a second count charging the defendant
with conspiracy.

It appeared in evidence that on the eighteenth day
of *April*, 1856, the defendant came to the prosecutor
at *Bradford*, and said:—"I have heard at the *Nelson
Inn* that you are in want of a good strong horse,
suitable for leading wood or anything else. I have
got one at the *Nelson Inn* of that sort, and if you can
make it convenient to look in any time this afternoon,
do so." That the prosecutor went that afternoon to
the *Nelson Inn*, and there saw the defendant and a
person called *Benjamin*, who the defendant said was
"his man," and who, together with the defendant,
showed the prosecutor a horse. That upon the pro-
secutor's professing himself "no judge of horseflesh,"

and asking if the horse was sound, the defendant said "as sound as possible for a horse to be."

1856.

KEIGHLEY'S
Case.

That the man called *Benjamin* then and there said, in the defendant's presence: "The horse is sound, I worked him myself along with another a month."

That upon the prosecutor observing that the horse seemed not right about the nostrils, the defendant said "he has got a bit of a cold, a little linseed will cure that."

That the defendant said at the same time "I am a farmer at *Otley*," and gave a name as his which was not his true name, nor yet a nickname by which he was usually known.

That upon these representations the prosecutor gave nine pounds ten shillings and another horse, the property of himself and his brothers, in exchange for the defendant's horse.

That, but for the statement about the horse being as sound as possible, and the defendant being a farmer at *Otley*, the prosecutor would not have bought the horse.

It was proved that the defendant was not a farmer at *Otley*, but a horse dealer at *Leeds*.

That the prosecutor was influenced by his belief that the defendant was a farmer to receive the horse of the latter, and part with his own and his money more readily than he would have done had he known the defendant to be a horse dealer.

It was proved by a veterinary surgeon that the defendant's horse was decidedly unsound, being affected by glanders, a highly contagious disease, the worst known to him among horses, rendering the animal dangerous to touch, and "not worth two pence;" that in his opinion the disease must have been of six months duration, and evident during that time to any one engaged about the horse.

1856.
 KEIGHLEY'S
 Case.

That there are means by the application of which the discharge from the nostrils, which is characteristic of the disease, may be arrested of a short time so as to deceive an ignorant person. But there was no direct evidence that such means had been employed in this instance.

For the defence, it was contended that this was a case of giving a false warranty of a horse, and therefore not an indictable offence; *Regina v. Pywell (a)*.

The jury found the defendant guilty on the first count for obtaining by false pretences.

The opinion of the Court of Appeal is requested, as to whether, considering the whole of the circumstances detailed, the conviction can be sustained.

Judgment is respite until the opinion of the Court of Appeal be obtained. The defendant is out on bail.

E. B. Wheatley,
 Deputy Chairman.

This case was argued on 15th *November*, 1856, before POLLOCK C. B., COLERIDGE J., WILLES J., BRAMWELL B. and WATSON B.

A. J. Johnston appeared for the Crown; no counsel appeared for the prisoner.

A. J. Johnston, for the Crown. The conviction is right. *Regina v. Pywell (a)*, which was relied on by the prisoner's counsel, was a case of conspiracy; and all the more recent cases show that it matters not whether the money is obtained through the medium of a contract, if the whole transaction is grounded in fraud; *Regina v. Kenrick (b)*, *Regina v. Roebuck (c)*, *Regina v. Burgon (d)*, and see also *Regina v. Oates (e)*. This is a stronger case than any of those because the horse was actually worthless.

(a) 1 Starkie, N. P. C. 402.

(b) 5 Queen's Bench Rep. 49.

(c) *Antè*, p. 24.

(d) *Antè*, p. 11.

(e) Dears. C. C. 459.

COLERIDGE J.—It is material to know whether a legal warranty was in fact given or not. 1856.

POLLOCK C. B.—Yes. The case ought certainly to state under what circumstances the bargain was made. KEIGHLEY's
Case.

BRAMWELL B.—If a warranty was not given it would be a stronger case.

The Court then ordered the case to be amended. The case as amended is above set out.

The case was further argued on 22nd *November*, 1856, before POLLOCK C. B., COLERIDGE J., WILLIAMS J., WILLES J. and WATSON B.

A. J. Johnston, for the Crown. If there was any evidence on which the jury could find that there was a false pretence by the prisoner, by means of which the money was obtained, the conviction must be confirmed. There was no warranty in point of law proved, although the facts are not inconsistent with there having been a warranty; and I contend that even if there was a warranty, still the conviction may be sustained.

POLLOCK C. B.—It is not stated as a fact in the case, that the prisoner knew that the horse had the glanders. Do you say that the statement by the prisoner that he was a farmer would be a sufficient false pretence?

A. J. Johnston. I shall not contend that the conviction can be sustained upon that pretence alone.

COLERIDGE J.—The question is, whether, under the circumstances stated in this case, the conviction can be sustained.

A. J. Johnston: I rely upon the general finding of the jury.

WILLIAMS J.—It would be all right if the Chairman directed the jury that they could not find

1856. the prisoner guilty unless he knew that the horse
KEIGHLEY'S was glandered.
Case.

POLLOCK C. B.—If the question put to us was, whether there was evidence to go to the jury, I should say yes, if they were properly directed; but how can I tell that they were properly directed? When the case was before us on the last occasion, I thought it too loose to say that the allegations in the indictment were proved; and I wished that the facts should be stated in order that we might see whether the case came within the statute which in my opinion was not intended to apply to any real transaction of buying and selling. But looking at the case as it now stands, unless the Chairman can state the facts more specifically, and the way in which they were left to the jury, we are not in a situation to say whether the conviction was right or wrong.

A. J. Johnston. The Chairman has stated to the Court all that he can state. We must assume that the questions were properly put to the jury, and that if the facts proved contained evidence to go to the jury, they have found such facts as will support the indictment.

WATSON B.—There is very slight evidence of knowledge that the horse was glandered.

A. J. Johnston. It is for the prisoner to show that the conviction is bad.

COLERIDGE J.—Then if the onus is upon him and he does not appear, we have nothing to do but to affirm the conviction.

WILLES J.—It is consistent with this case that the jury were told, that it was enough to justify a conviction if they believed that the prisoner knowingly made the false statement that he was a farmer.

POLLOCK C. B.—The question put to us is, whether the conviction can be sustained? We cannot see

upon what ground it proceeded. I do not know whether, upon the facts and the direction to the jury, the conviction was right or not. Therefore we do not see that it can be sustained. 1856.
KEIGHLEY'S
Case.

WILLES J.—We do not see that the case was left to the jury upon the only point upon which it was possible to sustain the conviction.

Conviction quashed.

REGINA v. WILLIAM REANEY and JAMES REDDISH. 1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal, by WILLES J.

The prisoners were convicted before me at the Winter Gaol Delivery for the county of *Derby* of the manslaughter of another *William Reaney* by injuries inflicted on the 11th of *October* last. Part of the evidence consisted of a dying declaration in the following terms:—" *October* 23rd, 1856; *William Reaney* states. I am a filesmith, and live in *Abbey Lane*. On *Saturday* night, the 11th of *October*, I was returning home from my work at Messrs. *Cammell & Johnsons*, at *Sheffield*. About seven o'clock I called at *Beighton's* public-house in *Little Sheffield*.

but I do not myself think I shall ultimately recover." He then made a statement to the constable, concluding, "I have made this statement believing I shall not recover;" and before the constable left the room the deceased said that he could not recover. *Held*, that the statement was sufficiently proved to have been made under a sense of impending death, and that it was admissible in evidence as a dying declaration.

Upon a trial for manslaughter, it was proved that the deceased eleven days before his death, being then in such a state that it was impossible for him to recover, said to a constable, upon his asking him how he was, "the doctor has given me some little hope that I am better,

1857.

REANEY'S
Case.

I saw *William Reaney* the prisoner there, and asked him if he was going home soon. He said I need be in no hurry. I told him I must go soon as I had the club money to pay before nine o'clock. When I got up to come away *William Reaney* followed me to the door; at that time *James Reddish* came up the street from the direction of the town, and *William Reaney* asked him if he had got any money. *Reddish* asked him what for, and *Reaney* said he wanted some bread and cheese, and I showed them a shop where they could get some. I then said to *Reaney* 'If thou is going to have some bread and cheese I must be off or I shall be too late.' I then came on my way home and called at *William Boot's* public-house at *Heely* on business and drank part of a pint of ale. I staid a few minutes and proceeded on my way. On arriving a little way from *Derbyshire Lane*, *William Reaney* and *James Reddish* overtook me. I accosted them first, saying 'You are come up.' On arriving at *Derbyshire Lane* a pot cart passed us, and *Reddish* got up behind and left me and *William Reaney* a short distance, and we came on together for about 200 yards, when *William Reaney* flew at me, struck me on the side of the head, and knocked me down. Whilst I was down he shouted out for '*Dick*.' At the same time he gave me several punches upon the ribs. He then bent down over me, and I felt his hand about my face, and I bit his thumb. When down I asked him what he was going to do, and he said 'Blast thee, I will show thee what I am going to do.' At that time *Reddish* came back and *Reaney* told him I had bit him. *Reddish* replied, 'Blast him. Punch his bloody guts out.' I then cried out murder several times. I received several more kicks, but do not know which of them gave them to me; they then both ran away. I got up and came forwards towards home. On

arriving at the steps near the white houses I heard footsteps behind me. I was turning round to see who it was, when I received a blow over the head and was knocked down. Whilst down I was punched several times. I am certain I was kicked by two men. I again cried out murder, and they gave over, and I raised myself up and saw *Reaney* cross the road and jump over into *Gillott's* field. I then got up and came on to the club house at Mrs. *Siddon's*. After stopping there I came home, and have not been out of bed since. I had not drank in the whole more than three pints of ale, and felt quite sober, and gave the prisoners no other provocation than what I have stated above. I have made this statement believing I shall not recover.

William Reaney."

1857.

REANEY'S
Case.

At the time the declaration was made the deceased was in a state, from the injuries that he received, from which it was impossible that he could recover. His spine was broken in such a manner that death must speedily have followed, and he died upon the 3rd of *November*.

The objection to the reception of the evidence was founded upon part of the evidence of *John Gillott*, a constable, who stated that he had seen the deceased man on the same day that he made the declaration, and shortly before he made it, and upon asking him how he was, the deceased answered, "I have seen Mr. *Booker*, the surgeon, to-day, and he has given me some little hope that I am better, but I do not myself think I shall ultimately recover."

The same witness stated that before he left the room, on the same occasion, the deceased said that he could not recover.

I admitted the evidence, reserving the point for the consideration of the Court for Crown Cases Reserved, and I left the prisoners in custody.

J. WILLES.

1857.
REANEY'S
Case.

This case was argued on 24th *January*, 1857, before POLLOCK C. B., WIGHTMAN J., MARTIN B., WILLES J. and WATSON B.

O'Brien (*Bell* with him) appeared for the Crown, and *D. Seymour* for the prisoners.

D. Seymour, for the prisoners. I submit that there was not sufficient evidence to render the statement of the deceased admissible as a dying declaration. The principle upon which such a declaration is received is, that it is made when the patient is at the point of death, when every hope in this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to utter the truth. The rule excluding hearsay evidence is in such a case dispensed with, because a situation so solemn and so awful is considered by the law as creating an obligation equal to that imposed by an oath; per *Eyre* C. B. in *Rex v. Woodcock* (a).

In the *Sussex Peerage* case Lord *Denman* lays down the rule in the following words (b): "With regard to declarations made by persons *in extremis*, supposing all necessary matters concurred, such as actual danger, death following it, and a full apprehension at the time of the danger and of death, such declarations can be received in evidence; but all these things must concur to render such declarations admissible. Such evidence, however, ought to be received with caution, because it is subject to no cross-examination."

The surrounding circumstances must be such as necessarily to exclude the supposition that the deceased at the time entertained some hope of recovery; there must be the impression of almost immediate dissolution, and death must in fact ensue.

(a) 1 Leach, 500.

(b) 11 Cl. & F. 112.

2 *Russ. on C. & M.* 756; *Greenleaf on Evidence*, 189; *Taylor on Evidence*, 2nd ed. 569. Here the evidence falls short of showing that the deceased apprehended immediate dissolution; there is no attention on his part to secular affairs, no farewell of friends, nothing to show that all hope was gone. The last statement of the deceased that he could not recover must be taken in connection with his first statement, which showed that the surgeon had given him some hopes. *Rex v. Moseley* (a); *Rex v. Van Butchell* (b); *Rex v. Bonner* (c); *Rex v. Spilsbury* (d); *Regina v. Howell* (e); *Rex v. Hayward* (f).

1857.

 REANEY'S
Case.

O'Brien, for the Crown, was not called upon by the Court.

POLLOCK C. B.—We are all of opinion that the evidence was admissible, and that the conviction was right. No doubt, in order to render a statement admissible in evidence as a dying declaration, it is necessary that the person who makes it should be under an apprehension of death; but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the person's mind at the time of making the declaration, than upon the interval

(a) 1 Moo. C. C. 97.

(b) 3 Carr. & P. 629. In that case *Hullock B.* says: "The principle on which declarations *in articulo mortis* are admitted in evidence is, that they are made under an impression of almost immediate dissolution. A man may receive an injury from which he may think that he shall ultimately never recover, but still that would not be sufficient to dispense with an oath." In the present case the deceased, before he made the declaration, said, that he did not think he should *ultimately* re-

cover, and that, standing alone, would indicate the state of mind contemplated by *Hullock B.*; but in addition to that the deceased at the end of the declaration stated, that he did not believe he should recover, and before the constable left the room he told him that he *could not* recover. See also *Rex v. Pike*, 3 Carr. & P. 598, and the authorities there referred to.

(c) 6 Carr. & P. 386.

(d) 7 Carr. & P. 187.

(e) 1 Den. C. C. 1.

(f) 6 Carr. & P. 160.

1857.

REANEY'S
Case.

between the declaration and the death. In this case the deceased was in such a state when he made the declaration, that it was impossible for him to recover, and, in point of fact, the statement having been made on 23rd *October*, he died on the 3rd of *November*. He says, "I have made this statement believing I shall not recover;" and immediately before making the statement, he told the constable to whom it was made that he had seen the surgeon that day, who had given him some little hope that he was better, but that he himself did not think he should ultimately recover. What the surgeon said was evidently said to assist nature by encouraging the patient; but the patient himself entertained no hope, and before the constable left the room he said he *could not* recover. He was in a dying state, and although in many cases the surgeon may be a far better judge of the real condition of the patient than the patient himself, still in a case like this, where there was an injury to the spine, the sufferer was probably a more competent judge of his condition than the doctor; he was suffering from a mortal injury, and was perfectly conscious of it, and I think that, under these circumstances, the evidence was properly admitted, and the conviction was right.

WIGHTMAN J.—I am entirely of the same opinion. The statement, in order to be admissible, must be made under an impression that death is impending—that death must in a comparatively short lapse of time ensue; not that the man must die some time or other, for that is a debt we all owe to nature. Now here the deceased was so injured, his *status* was such, that he could not possibly recover; his spine was broken, and he did in fact die; and what was his own opinion? He said he should not recover. He had no hope, though the doctor had held out hopes,

and before the constable left the room he said that he *could not* recover. That was his own opinion of his case, and the impression on his mind was that death was impending.

1857.
REANEY'S
Case.

MARTIN B.—I am of the same opinion. It seems to me that whether the deceased was in such a state of mind as to render his statement admissible, was a question for the Judge who tried the case, and not for this Court.

WILLES J.—I was of opinion at the trial that it was perfectly clear that the evidence was admissible, and I am of the same opinion now. Great stress was placed by the learned counsel who defended the prisoners at the trial upon the word “ultimately,” as not indicating expectation of speedy death, but, upon the whole, I thought the evidence was admissible.

WATSON B.—I am entirely of the same opinion. The statements of the deceased show that the declaration was made under the impression of impending death.

Conviction affirmed.

x 2 Fair Rev C Rep 586

REGINA v. JOSEPH WILSON.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal

The prisoner was convicted of stealing certain articles which

were stolen from the prosecutor's house on *November 2*, and sold by the prisoner on the night of *November 4* in a room in a public house in which there were about thirty persons. The prisoner told the constable that *C.* and *D.* brought the goods to his house and that *E.* would say so, and that being on the spree he (the prisoner) sold the goods and spent the money. *C.* was subsequently convicted of stealing articles taken from the prosecutor's house at the same time when the articles in question were stolen. Neither *C.*, *D.* nor *E.*, though real persons and known to the constable, were called on the part of the prosecution. *Held*, that the conviction was right.

1857.

WILSON'S
Case.

Appeal, by the Deputy Chairman of the Quarter Sessions for the West Riding of *Yorkshire*.

Joseph Wilson was tried before me at the West Riding intermediate Sessions held at *Sheffield*, on the 2nd day of *December*, 1856, on an indictment charging him with stealing, and also with receiving, articles of dress, knowing them to have been stolen. The prosecutor, *Thomas Wilson*, proved that his house was broken open on *Sunday*, the 2nd day of *November*, and the articles in question, two waistcoats and two pairs of trousers, taken from it. A witness, named *William Scannell*, proved that he bought them from the prisoner for twelve shillings in a public house in *Sheffield*, on *Tuesday* night the 4th *November*, about thirty persons were in the room at the time, and the prisoner sold the articles openly without attempt at concealment. *Scannell's* wife proved that she pawned them on the fifth, when they were stopped by the pawnbrokers as stolen goods, and through the information of the *Scannells*, the prisoner was taken into custody. To the constable who charged him with the felony, the prisoner said, "*Cocking* and *Derby* brought them to my house, and the woman who keeps my house (*Mrs. Wilson*) will say so, and I being on the spree, sold them and spent the money." In consequence of this statement, *Cocking* and *Derby* were apprehended, and *Cocking* was committed for trial, and convicted of stealing articles taken at the same time from the prosecutor's house. *Derby* was taken before the magistrates, but discharged by them for want of evidence against him. The constable went to *Mrs. Wilson's* house, and made some inquiries as to the prisoner's statement. No evidence of what transpired on such inquiries was received.

No question was raised in the case as to the identity

of the stolen articles. This was the case for the prosecution.

1857.

 WILSON'S
Case.

Counsel for the prisoner submitted that there was no case to go to the jury, and contended that, as the prisoner had stated how he came into possession of the stolen property, and had mentioned the names of the persons from whom he had received it, those persons being real persons and known to the constables, it was incumbent on the prosecution to negative his statement, if false, by calling *Cocking* or *Derby*, or Mrs. *Wilson*, and that it was not in accordance with the rule of evidence which excludes hearsay for the constable to come and swear what those persons told him, or the result of inquiries made to them. The cases of *Reg. v. Crowhurst (a)*, *Reg. v. Smith (b)*, and 2 *East P. C.* 665, were referred to.

I overruled the objection, and told the jury that, the constable having made inquiries which had satisfied him, it was not necessary for the prosecution to call *Cocking* or *Derby*, or Mrs. *Wilson*, as witnesses at the trial. It might have been more satisfactory if they had been called, but it was in the prisoner's power, if he required their testimony, to have called them, and it was for the jury to say if they thought the evidence as it stood sufficient.

The prisoner was convicted of stealing, and sentenced to three calendar months imprisonment, but execution of this sentence was respited, and the prisoner liberated on bail to await the decision of the Court of Criminal Appeal on the following question: Whether under the circumstances of the case, which rested solely on a recent possession of the stolen goods, it lay on the prosecution to call the persons to whom the prisoner referred, to account for his possession, or some of them, as witnesses at the trial?

(a) 1 C. & Kir. 370.

(b) 2 C. & Kir. 207.

1857.

WILSON'S
Case.

And, whether, the prosecution not having called those witnesses, the conviction ought to be quashed?

This case was considered on 24th *January*, 1857, by POLLOCK C. B., WIGHTMAN J., CRESSWELL J., MARTIN B. and WATSON B.

A. J. Johnston appeared for the Crown, but was not called upon by the Court. No counsel appeared for the prisoner.

POLLOCK C. B.—No doubt in this case there was evidence to go to the jury, and the conviction must be affirmed; but I should be sorry that, upon such evidence, any prisoner should be convicted before me.

CRESSWELL J.—I have no remark to make except that there was evidence for the jury upon which the prisoner might be convicted.

The other learned Judges concurred.

Conviction affirmed.

post 593

1856.

REGINA v. GEORGE BRERETON SHARPE.

1857.

SC 1 Cr 214

It is a mis-
demeanor at
common law
to remove
without law-
ful authority
a corpse from
a grave in
a burying
ground be-
longing to a
congregation
of Protestant
dissenters;
and it is no
defence to
such a charge
that the
motive of the person removing the body was pious and laudable.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by ERLE J.

The indictment in the first count charged that the defendant a certain burial ground belonging to a certain meeting house of a congregation of Protestants, dissenting from the Church of England, unlawfully and wilfully did break and enter; a certain grave there, in which the body of one *Louisa Sharpe* had before then been interred, with force and arms unlawfully,

motive of the person removing the body was pious and laudable.

wilfully, and indecently did dig open, and the said body of the said *Louisa Sharpe* out of the said grave unlawfully, wilfully, and indecently did take and carry away.

1857.

SHARPE'S
Case.

And there were other counts varying the charge which may be resorted to, if necessary.

The evidence was as follows.

That the defendant's family had belonged to a congregation of dissenters at *Hitchin*, and his mother, with some others of his relatives, had been buried in one grave in the burying ground of that congregation there, with the consent of those who were interested. That the father of the defendant had recently died. That the defendant prevailed on the wife of the person to whom the key of the burying ground was entrusted to allow him to cause the grave above mentioned to be opened, under the pretext that he wished to bury his father in the same grave, and in order thereto to examine whether the size of the grave would admit his father's coffin. That he caused the coffins of his step mother and two children to be taken out, and so came to the coffin of his mother, which was under them, and was much decomposed, and that he caused the remains of this coffin, with the corpse therein, to be placed in a shell and carried to a cart near the burying ground, and driven therein some miles away towards a churchyard, where he intended to bury his father's corpse with the remains of his mother.

These acts were done without the knowledge or consent of the congregation to whom the burying ground belonged, or of the trustees having the legal estate therein. The person having the keys of the ground was induced to admit the defendant into the ground and to the grave by reason of the pretext that the defendant intended to bury his father there, and the jury found that this was only a pretext, and that his

1857. real intention from the beginning was to remove his mother's corpse. But the defendant acted throughout without intentional disrespect to any one, being actuated by motives of affection to his mother and of religious duty.

SHARPE'S
Case.

I directed the jury to convict, if they believed these facts to be true, and reserved for the decision of this Court the question whether the conviction could be sustained.

Accordingly a verdict of guilty was entered, and the defendant was discharged on his recognizances to appear if called on.

This case was considered on *Saturday*, 15th of *November*, 1856, by POLLOCK C.B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

The defendant appeared in person, and contended that the conviction was wrong. No one appeared for the Crown.

The judgment of the Court was delivered on the 31st of *January*, 1857, by

ERLE J.—We are of opinion that the conviction ought to be affirmed. The defendant was wrongfully in the burial ground, and wrongfully opened the grave, and took out several corpses, and carried away one. We say he did this wrongfully, that is to say, by trespass; for the licence which he obtained to enter and open, from the person who had the care of the place, was not given or intended for the purpose to which he applied it, and was, as to that purpose, no licence at all. The evidence for the prosecution proved the misdemeanor, unless there was a defence. We have considered the grounds relied on in that behalf, and, although we are fully sensible of the estimable motives on which the defendant acted, namely, filial affection and religious duty, still neither

authority nor principle would justify the position that the wrongful removal of a corpse was no misdemeanor if the motive for the act deserved approbation. A purpose of anatomical science would fall within that category. Neither does our law recognise the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognises no property in a corpse, and the protection of the grave at common law, as contradistinguished from ecclesiastical protection to consecrated ground, depends upon this form of indictment; and there is no authority for saying that relationship will justify the taking a corpse away from the grave where it has been buried. We have been unwilling to affirm the conviction on account of our respect for the motives of the defendant, but we have felt it our duty to do so rather than lay down a rule which might lessen the only protection the law affords in respect of the burials of dissenters. The result is that the conviction will stand, and the Judge states that the sentence should be a nominal fine of one shilling.

1857.

 SHARPE'S
Case.

Conviction affirmed (a).

(a) See *Rex v. Lynn*, 2 T. R. 733; *Duffin and Marshall*, Russ. & Ry. S. C. 1 Leach, 497; *Rex v. Cundick*, 365; *Rex v. Gilles*, ib. 366, note D. & Ry., N. P. C. 13; *Rex v.* (b.)

1857.

REGINA v. MARY ANN FARROW.

The prisoner was convicted on an indictment, under section 6 of 7 Wm. 4 & 1 Vict. c. 85, containing several counts, for administering and causing to be taken by L.C. certain noxious drugs, with intent to procure abortion. It appeared that the prisoner delivered certain drugs to L.C. in order that she might take them with a view to produce abortion, and told her where she could procure other drugs with the same view. That the last mentioned drugs were procured by L.C., and afterwards made into pills by the prisoner, and that L.C.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by BRAMWELL B.

Mary Ann Farrow was tried before me at *Chelmsford* on the 12th of *December* last on an indictment which contained the following counts:—

1st. A count for administering a certain noxious drug called *savin*.

2nd. For causing to be taken a noxious drug called *savin*.

3rd. For causing to be taken a noxious mixture, that is to say, *gin* and *savin*.

4th. For causing to be taken a noxious thing to the jury unknown.

To and by *Louisa Chuter* with intent to procure abortion.

Louisa Chuter's deposition was read in evidence, and is to be considered true. It is as follows:—

“On or about last *June*, I think, I was in my shop standing behind the counter, when *Mary Ann Farrow* came in the shop and I asked her to have some tea. We were talking about having children, when *Farrow* said she had had a large family and did not intend to have any more, and she told me she knew of something she could give me that would get rid of my child. I asked her what it was, and she said ‘*savin*,’ or some-

did, for the purpose aforesaid, take not only the drugs so delivered to her by the prisoner, but also the drugs so procured by L.C. and made into pills by the prisoner; and that enough of each was taken to be noxious; but it did not appear that the prisoner was present when any of the drugs were taken. *Held*, that the conviction was right, and that the case was not distinguishable from *Regina v. Harriett Wilson* (a).

thing of that kind. We had several times previously talked together about my being in the family way, and she, *Farrow*, said she would bring some savin to destroy my child. A few weeks afterwards she brought me a bunch of savin and told me if I put it in some gin and took from a half a glass to a glass two or three times a week, it would destroy my child. After she had brought the savin she called from time to time and asked whether the savin had taken effect. I took the savin and gin three or four times. By *Mary Ann Farrow's* request I then sent to Mr. *Fitts* the Chemist, in *Barking*, for some stuff. I believe they were blue pills, or *hiera picra*. I always felt very ill after taking the savin and likewise after taking the pills. When I was about four or five months gone I took the savin, and about a month after that I took the pills, of which I took about twenty or thirty. The prisoner *Farrow* made up the stuff with some flour and tea into pills. The pills made me very ill in my inside and brought on a great deal of bearing down pain. I was very poorly and ill and bad from the time of taking the pills given me by *Mary Ann Farrow* until the time I was confined. Since my confinement it has preyed on my mind very much and I have been unable to rest. I make this statement thinking that I am in great danger and shall not get better, and that I shall not get off my bed any more."

Cross-examined by prisoner:—"I did not call *Mary Ann Farrow*, she always came in."

It is also to be taken that enough to be noxious was taken by her of each matter of which she partook.

The prisoner was convicted.

I entertained doubts whether there was any such administering or causing to be taken as laid in the

1857. indictment, and reserved the question for the Court
 FARROW'S of Criminal Appeal, releasing the prisoner on bail.
 Case. G. BRAMWELL.

This case was considered on 24th *January*, 1857,
 by POLLOCK C. B., WIGHTMAN J., CRESSWELL J.,
 MARTIN B. and WATSON B.

Rodwell appeared for the Crown, but was stopped
 by the Court. No counsel appeared for the defendant.
Cur. adv. vult.

The judgment of the Court was delivered on 31st
January, 1857, by

CRESSWELL J.—The Court cannot see any distinction
 between this case and *Regina v. Harriett Wilson (a)*,
 and therefore the conviction must be affirmed.

Conviction affirmed.

(a) *Antè*, p. 127.

1857.

REGINA v. WILLIAM GORBUTT.

The prisoner was indicted, as a servant, for stealing 300*l.* the property of his masters. THE following case was reserved and stated for the consideration and decision of the Court of Criminal
 There was ample evidence of embezzlement, but not of stealing. The jury found a general verdict of guilty. *Held*, that the conviction was wrong notwithstanding the 13th section of 14 & 15 *Vict.* c. 100.*

* That section enacts, that "if upon the trial of any person indicted for larceny, it shall be proved that he took the property in question, in any such manner as to amount in law to embezzlement, he shall not by reason thereof be entitled to be acquitted; but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement."

Appeal by the Chairman of the Quarter Sessions for the County of *Lancaster*.

1857.

GORBUTT'S
Case.

At the General Quarter Sessions of the Peace for the county of *Lancaster* holden by adjournment at *Preston*, the 2nd day of *July*, 1856, before *Thomas Batty Addison*, Esquire, Chairman, and other Justices, *William Gorbutt* was tried upon an indictment of which the following is a copy :—

Lancashire to wit. The jurors for our Lady the Queen upon their oath present that *William Gorbutt* late of the parish of *Whalley* in the county of *Lancaster* labourer on the thirtieth day of *April* in the year of our Lord 1856 at the parish aforesaid was servant to *William Ecroyd* and another and that the said *William Gorbutt* being and whilst he was such servant as aforesaid to wit on the day and year aforesaid at the parish aforesaid certain money to wit to the amount of three hundred pounds the property of the said *William Ecroyd* and another his masters as aforesaid from the said *William Ecroyd* and another his said masters feloniously did steal take and carry away against the form of the statute in such case made and provided and against the peace of our Lady the Queen her Crown and dignity.

And the jurors aforesaid upon their oath aforesaid do further present that the said *William Gorbutt* on the 31st day of *May* in the year aforesaid at the parish aforesaid was servant to the said *William Ecroyd* and another and being such servant and whilst he was such servant and within six calendar months after the time of the committing of the said offence in the first count of this indictment stated and charged to wit on the day and year last aforesaid at the parish aforesaid certain and other money to wit the amount of three hundred pounds the property of

1857. the said *William Ecroyd* and another his masters as
GORBUTT'S aforesaid from the said *William Ecroyd* and another
Case. his said masters feloniously did steal take and carry
away against the form of the statute in such case
made and provided and against the peace of our
sovereign Lady the Queen her Crown and dignity.

The following facts appeared in evidence:—

The prisoner entered the service of the prosecutors
William Ecroyd and *William Farrar Ecroyd* in *July*,
1855. On the 4th of *February*, 1856, he was ap-
pointed their cashier and he was their servant in that
capacity during the transactions hereinafter mentioned.

It was his duty as cashier to receive monies payable
to the prosecutors, to enter such monies in his cash
book as coming from the respective persons by whom
they were paid, and safely to keep for the use of the
prosecutors the said monies or so much thereof as was
not lawfully disbursed by him on their account. He
was not required to keep distinct from each other in
specie the respective sums received from the several
parties making payments; but the aggregate of the
said sums (less by the prisoner's disbursements) formed
one cash balance, for which he was responsible to the
prosecutors.

It was likewise his duty to keep the ledger wherein
each customer was debited with such demands as the
prosecutors had against him, and credited for his
payments to the prosecutors.

On several occasions after the 4th *February*, 1856,
payments were made by customers to each of the
prosecutors and to other persons in their employ.

Shortly after each of such payments the money was,
by the person so receiving the same, handed over to
the prisoner as cashier, and as a payment made by
such respective customer to the prosecutors. It was

the prisoner's duty to debit himself in his cash book with every such payment, and credit the customer with such payment in the prosecutors' ledger.

1857.

 GORBUTT'S
Case.

The prosecutors themselves, or one of them, examined the prisoner's accounts occasionally.

The prosecutor *William Farrer Ecroyd* examined them on *Saturday*, the 31st *May*, 1856, when the prisoner produced his cash book showing that there should be then in his hands a balance of 360*l.* 12*s.* 4½*d.*, which amount the prisoner then stated was the real balance then due from him to the prosecutors. He further stated that he then had in his hands on account of the prosecutors 356*l.* 17*s.* 10*d.*, which, with three small sums due to him from the prosecutor, *William Ecroyd*, made up the above balance, except a small deficiency of three pence, and he produced the following account of the money in his hands, and represented the same to be correct, viz.:

Bank of England Notes	.	£265	0	0
Gold	.	52	0	0
Half Crowns	.	25	17	6
Six and Fourpenny Pieces	.	3	5	0
Copper	.	0	0	4
Money owing by <i>W. E.</i>	.	1	5	6½
Ditto ditto	.	1	2	11½
Ditto ditto	.	1	5	9½
<hr/>				
		£360	12	1½

And the prisoner then produced and exhibited the bank notes and coins mentioned in such accounts, and the same were then left in his hands.

On *Monday*, the 2nd day of *June*, 1856, the prosecutor *William Farrer Ecroyd* observed that the prisoner had in his cash book debited himself with a sum of 731*l.* 5*s.* 10*d.*, as a payment from *Luccock, Lupton & Co.*, 19th *May*, 1856, whereas the true

1857. amount of such payment was 751*l.* 5*s.* 10*d.*, which last mentioned sum had actually been received by *William Farrer Ecroyd* himself, and by him handed over to the prisoner on the day following such receipt, viz., the 20th *May*, as a payment by the said *Luccock & Co.*, and the prisoner himself had in the ledger, where a debtor and creditor account was kept with *Luccock & Co.*, given *Luccock & Co.* credit for the true amount of 751*l.* 5*s.* 10*d.*, so that by such false entry in the cash book the prisoner had made, the balance in his hands, as above mentioned, appear less than it should have done by 20*l.* *William Farrer Ecroyd*, therefore, charged the prisoner with such fraud, and took possession of all that was then remaining in the prisoner's hands as cashier, and which was as follows, viz. :—

Bank of England Notes	£85	0	0
Gold	81	0	0
Half Crowns	36	17	6
Shillings	10	15	0
Copper	0	0	4
Six and Fourpenny Pieces	3	5	0
	<hr/>		
	£216	17	10
Taken by the prisoner to <i>Carr</i>			
<i>Mill</i> to obtain change	100	0	0
Paid on <i>W. Ecroyd's</i> account			
as above	3	14	3½
	<hr/>		
	£320	12	1½

being 40*l.* less than the balance which the prisoner had shown on the 31st of *May*, though he had made no payment, nor was there any other circumstance that could occasion such diminution lawfully.

But upon examining the books kept by the prisoner, false entries were found, the correction of which would

show a further deficiency to the amount of 170*l.*, and some of which were of this nature. The prisoner had entered in his cash book under date of 7th *May*, that he had received from *David Midgley*, cash 365*l.* 4*s.*, and that he had allowed him a discount of 14*l.* 6*s.*, whereas the sum really received by the prisoner from *David Midgley*, was 370*l.* 4*s.*, and the real discount allowed was 9*l.* 4*s.*, and the prisoner had signed in due course a receipt acknowledging the payment by *David Midgley*, of cash to the true amount of 370*l.* 4*s.*, and had in the ledger (where a debtor and creditor account was kept with *David Midgley*) given him credit for the right aggregate amount of 379*l.* 10*s.*

1857.

 GORBUTT'S
Case.

Eight false entries of this kind (including the cases of *Luccock & Co.* and *Midgley*) were found in the cash book effecting an aggregate fraud of 63*l.* The dates of them extend from 7th *February* to 19th *May*.

Another class of the prisoner's false entries consisted of misadditions in his cash book, *i. e.* adding up his receipts at the bottom of the page to less, and his disbursements and allowances of discounts to more than the true amounts.

Those given in evidence extended from the 6th *March* to the 20th *May*.

It was not further shown at what particular time any sum was misapplied by the prisoner, nor were his deficiencies further traced or identified with any of the particular sums to which the false entries related.

Counsel for the prisoner contended that the facts above stated were no more than a general deficiency in the prisoner's accounts, and were not evidence to go to the jury, as proving the prisoner guilty of the offence charged in the indictment.

The Chairman directed the jury.

1. That as there was proof of a deficiency, and no

1857.
 GORBUTT'S
 Case.

proof that it arose from any other transactions than those which the false entries were made with an evident purpose to disguise and conceal, there was evidence from which a jury might infer that the deficiency did arise from those transactions.

2. That the nature of the false entries afforded evidence from which a jury might infer that the deficiency did not arise from negligence or accident, but was wilful and fraudulent.

3. That such false entries commencing almost from the time of the prisoner's appointment as cashier, and systematically continued, relating also to matters of which it was his duty to make without unreasonable delay correct entries, were evidence from which a jury might infer that he received the monies to which the said entries related with no intention to apply the same faithfully, but with a preconceived intention to apply the same or some part thereof to his own use.

4. That if the jury should make the inferences above mentioned, they might convict the prisoner upon this indictment.

The jury found a general verdict of guilty, and the Court sentenced the prisoner to four years of penal servitude, but states this case to the Court of Criminal Appeal, and requests the opinion of her Majesty's Judges, whether the prisoner has been duly convicted.

The following cases were cited in argument. *Reg. v. Grove (a)*, *Reg. v. Hall (b)*, *Reg. v. Chapman (c)*, *Reg. v. Moah (d)*.

This case was considered on the 24th of *January*, 1857, by POLLOCK C. B., WIGHTMAN J., CRESSWELL J., MARTIN B. and WATSON B.

No counsel appeared.

Cur adv. vult.

(a) 7 Carr. & P. 635.

(b) Russ. & Ry. 463.

(c) 1 Cox, C. C. 47.

(d) Dears. C. C. 626.

The judgment of the Court was delivered on the 31st of *January*, 1857, by

1857.

GORBUTT'S
Case.

CRESSWELL J.—The indictment in this case was against the defendant as a servant for stealing, not for embezzling. The evidence set out is rather long. It appears that the Chairman put several questions to the jury, and he says the jury found a general verdict of guilty, and the Court thereupon sentenced the prisoner to four years of penal servitude. He states a case to the Court of Criminal Appeal, and requests our opinion whether the prisoner has been duly convicted. Of course he means to inquire whether the evidence set out was such as would warrant a verdict of guilty of stealing. Now we think there is abundant evidence of embezzlement, but not evidence of stealing; and although, under the clause in the recent Act of Parliament, a prisoner indicted for stealing may be convicted of embezzlement, yet he cannot be convicted of stealing if there is only evidence of embezzlement; therefore we think the verdict was not warranted by the evidence, and the conviction must be reversed.

Conviction quashed.

NOTE.

REMOVAL OF INDICTMENTS BY CERTIORARI.

THE power of the Court of Queen's Bench to remove indictments and inquisitions for felony or misdemeanor has been materially increased by the provisions of 19 & 20 *Vict. c. 16.*, which extends the power to remove and try in the Central Criminal Court to all cases in which *it shall appear* to the Court of Queen's Bench in Term time, or to any Judge thereof in Vacation, *that it is expedient to the ends of justice* that such indictment or inquisition should be tried at such Central Criminal Court. The provisions of this important statute were recently considered by the Court of Queen's

1857. Bench in *Regina v. Palmer (a)*, in which case the Court removed a coroner's inquisition, and an indictment to be found at the ensuing assizes for murder, from a county at large to the Queen's Bench by certiorari, on it appearing that a fair trial could not be had in the county; but when, after such removal, the defendant was, under the provisions of the above statute, ordered to be tried at the Central Criminal Court, the Court of Queen's Bench refused to make it a condition under section 24 of that statute, that the prosecutor should furnish the defendant with evidence, which it was suggested had been obtained by the prosecutor since the taking of the depositions.

In *Regina v. Wilks and others (b)*, the Court of Queen's Bench, under the circumstances hereunder stated, held that a Judge at Chambers had a discretion, the exercise of which that Court would not review. It appeared that one of three defendants who were jointly indicted for misdemeanor at the Central Criminal Court, having obtained a certiorari from a Judge at Chambers to remove the indictment into the Queen's Bench, entered into recognizance, conditioned to pay the costs of the prosecution if he was convicted, to appear, plead and try. The other two defendants concurred, but simply entered into recognizance to appear, plead and try.

On the part of the prosecution a rule for a procedendo was obtained, and it was contended that this course created hardship on the prosecutor, as, if the defendant removing were acquitted but the other two convicted, the prosecutor would have no security for his costs; but the Court of Queen's Bench, on the ground above stated, discharged the rule. The same Court, has however, since decided in *Regina v. Jewell and Perceval (c)*, (in which the effect of section 5 of 16 & 17 Vict. c. 30. was considered), that a Judge may, where a certiorari to remove an indictment into the Queen's Bench is applied for at the instance of one of two defendants, require that the condition of the recognizance shall be that the defendant so applying shall be liable for the prosecutor's costs, in case either he or the other defendant shall be convicted.

(a) 5 Ell. & Bl. 1024.

(b) 5 Ell. & Bl. 690.

(c) Not yet reported; but a reference to the regular reports in

which this case will be found will be inserted in the Table of Cases accompanying this Volume.

REGINA v. WILLIAM FITCHIE.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by MARTIN B.

The prisoner was indicted on the 2nd count of the indictment for uttering "an accountable receipt for goods" against the form of the statute. In the 4th count the document was described as an accountable receipt for goods, to wit, an accountable receipt for goods usually known by the name of a pawn ticket. In the 6th count the document was described as an accountable receipt for goods usually called a pawnbroker's duplicate. In the 8th count the document was described as a forged receipt for goods, to wit a pawn ticket. In the 10th count the document was described as a warrant for the delivery of goods, to wit a warrant usually known by the name of a pawn ticket. In the 11th count the document was described as a forged acquittance for goods, and the document was set out as follows:—

William Fitchie, Pawnbroker,

No. 85, Church Street,

Preston, 15th January, 1856.

741 Blanket—2 Sheets—Counterpane

8/

Elizabeth Hopwood New Preston.

7

7

1/10

5

and the meaning of this document was alleged by

A pawnbroker's ticket or duplicate given in the form prescribed by 39 & 40 Geo. 3. c. 99. s. 6, is "an accountable receipt for goods" within section 10 of 11 Geo. 4 & 1 Wm. 4. c. 66. Proceedings having been taken before justices, under section 14 of 39 & 40 Geo. 3. c. 99, to compel a pawnbroker to deliver certain goods which had been pledged with him, the money advanced with interest having been repaid, he produced and delivered to the justices, through the hand of his attorney, a forged ticket or duplicate, as the genuine ticket which he had given when the goods

were pledged, and which he had received back when the money was repaid. *Held*, that this amounted to an uttering by the pawnbroker.

1857. averment to be that *Elizabeth Hopwood* had pledged a blanket, two sheets and a counterpane with the prisoner for 8s., and that she had required the redelivery of the articles, and paid him the 8s. advanced and 1s. 10d. for profit. In all the counts the uttering was alleged to be against the form of the statute.

FITCHIE'S
Case.

The facts proved were these. On the 15th *January*, 1856, *Elizabeth Hopwood* pledged with the prisoner, who was a pawnbroker in *Preston*, three blankets, one counterpane and one pair of sheets for eight shillings, and he gave her a ticket or note, which a pawnbroker is required to give by the statute 39 & 40 *Geo. 3. c. 99. s. 6.* to the person pawning goods. On the 26th *November*, 1856, *Robert Hopwood*, the husband of *Elizabeth Hopwood*, went to the prisoner's shop to redeem the goods, and took with him the said ticket or note, which he delivered to the prisoner. The prisoner stated that the interest was one shilling and ten pence, which *Robert Hopwood* paid, together with the eight shillings, and the prisoner delivered to him a bundle tied up in a handkerchief. He brought the bundle home, and, upon opening it, it was found to contain only one blanket, one counterpane and a pair of sheets, which were not the sheets pledged by *Elizabeth Hopwood*. In consequence of the non-return of the goods pledged, *Robert Hopwood*, in due form of law, took proceedings against the prisoner under the provisions of the 14th section of the said statute, and the case, in like due form of law, came on to be heard before the justices on the 3rd *December*, 1856. At the hearing the prisoner was defended by Mr. *Ascroft*, an attorney employed by him. The prisoner was present. Mr. *Ascroft*, in his presence, produced a ticket or note, and handed it up to the justices, and stated that it was the ticket or note which the prisoner had given to *Elizabeth Hopwood* when

the goods were pledged, and which *Robert Hopwood* had given back to him when he received the eight shillings and one shilling and ten pence, and when he gave to *Robert Hopwood* the bundle containing the articles before mentioned.

1857.

 FITCHIE'S
Case.

The following is a copy of the ticket or note :—

William Fitchie, Pawnbroker,
No. 85, Church Street,
Preston, 15th January, 1856.
741 Blanket—2 Sheets
Counterpane

8/

Elizabeth Hopwood
New Preston.

H. L.

The jury found—

1st. That the ticket produced before and handed up to the justices by Mr. *Ascroft*, as before mentioned, as the genuine ticket originally given by the prisoner to *Elizabeth Hopwood*, and afterwards delivered back to him by *Robert Hopwood*, was not the genuine ticket, but was a false and fabricated ticket.

2ndly. That the prisoner did, through the hand of Mr. *Ascroft* his attorney, deliver to the justices, as being the genuine ticket, the said false and fabricated ticket, he knowing it to be false and fabricated.

I request the opinion of the Court of Criminal Appeal upon the following questions.

First. Was the production and delivery of the document in the manner before mentioned by Mr. *Ascroft* before and to the justices, taken together with the finding of the jury, an uttering by the prisoner?

Secondly. Was the doing so an offence as averred in any of the counts of the indictment before mentioned?

SAMUEL MARTIN.

April 21, 1857.

1857. This case was argued on the 25th *April*, 1857,
FITCHIE'S before COCKBURN C. J., COLERIDGE J., MARTIN B.,
Case. CROMPTON J. and WILLES J.

R. A. Cross appeared for the Crown, and *Monk* for the prisoner.

Monk, for the prisoner. First. The production of the ticket and its delivery to the justices by Mr. *Ascroft* was not an uttering by the prisoner.

COCKBURN C. J.—Does not the finding of the jury import that the attorney produced the document and delivered it to the justices by the authority of the prisoner?

Monk. The finding of the jury is not conclusive of the criminal responsibility of the prisoner.

CROMPTON J.—Was there not evidence to go to the jury that the uttering was the act of the prisoner?

COLERIDGE J.—Is it not distinctly found by the case that he did it?

Monk. I contend that there is nothing to shew that the delivery of the ticket to the justices was intended by the prisoner.

MARTIN B.—I agree with you that, if the production of the ticket by the attorney was without the consent or sanction of the prisoner, it would not be an uttering by him; but here the jury have found that the prisoner delivered the ticket to the justices through the hand of *Ascroft*.

Monk. Secondly. The document is not of such a nature that the forging or uttering it is within the 10th section of 11 *Geo.* 4 & 1 *Wm.* 4. c. 66. The ticket was not an accountable receipt for goods within the meaning of that section. Section 6 of 39 & 40 *Geo.* 3. c. 99., after enacting that every person taking goods by way of pledge shall enter in a book a description of the goods, the money lent thereon and certain other particulars, provides, that “every such

person shall at the time of the taking of every pawn, pledge or exchange whatsoever, give to the person or persons so pawning, pledging or exchanging the same, a note or memorandum fairly and legibly written or printed, or in part written and in part printed, containing therein in like manner a description of the goods and chattels which he, she or they have received in pawn, pledge or exchange; and also the sum of money advanced thereon, with the day of the month and year on which, and the name and place of abode and number of the house, if said to be numbered, of the person or persons by whom such goods or chattels are so pawned, pledged or exchanged, and whether such person is a lodger or housekeeper as aforesaid, by using the letter 'L' if a lodger, and the letter 'H' if a housekeeper; and also the name and place of abode of the owner or owners thereof, according to the information aforesaid, and upon which said note or memorandum or on the back thereof, shall be moreover fairly written or printed, the name and place of abode of the pawnbroker, giving the same." The note or memorandum thus required to be given is not an accountable receipt, nor would any one suppose that, by the words of the enactment, the Legislature intended that an accountable receipt for the goods should be given. In fact all that is required is a note or memorandum of an entry in the pawnbroker's book, and the document is throughout the statute referred to as a "note or memorandum," and not as a receipt. The ticket does not on the face of it purport to be a receipt, and can only be shewn to be so by matter *dehors* the document itself. This particular ticket cannot be shewn to be an accountable receipt by such matter, inasmuch as it was only produced after the goods pawned had been returned, and when its legal operation was exhausted.

1857.

FITCHIE'S
Case.

1857.

FITCHIE'S
Case.

COLERIDGE J.—Is not a ticket of this kind an accountable receipt for the goods at the time when they are pledged? In its creation it acknowledges the receipt of goods for which the pawnbroker is accountable.

Monk. Admitting that to be so, in this case the goods had been returned before the ticket was produced; and moreover it was produced, not by the person who would on its production be entitled to receive the goods, but by the pawnbroker who gave it, and when it could not be made an accountable receipt by the surrounding circumstances.

COCKBURN C. J.—It is as if an action was brought to recover the goods and was met by the production of a forged receipt.

Monk. This document may, for anything which appears on the face of it, as well be an invoice of goods sold as a receipt; and, not being according to its tenor a receipt, it was not uttered under circumstances which would make it so. No doubt certain documents, a receipted invoice for instance, are within the statute, though in order to explain them reference must be made to matter *dehors* the documents; but I submit that this is not an instrument of that kind.

COLERIDGE J. referred to *Regina v. Ion* (a).

Monk. In that case the prisoner placed a forged receipt for poor rates in the hands of the prosecutor, for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person, and that was held to be an uttering; but the distinction to be drawn is, that, in that case, the receipt purported to be a receipt for all

time; but here the ticket was an acknowledgment of a temporary possession only of the goods till the money was repaid, and the money having actually been repaid and the ticket returned, it had lost its operation and could not be an accountable receipt within the statute.

1857.

 FITCHIE'S
Case.

COLERIDGE J.—You must look at the character of the instrument at the time when it was made. Suppose the prisoner had been charged with forging instead of uttering it, would it be the less an accountable receipt because the ticket had got back into his hands?

R. A. Cross, for the Crown, was not called upon by the Court.

COCKBURN C. J.—I am of opinion that the prisoner was properly convicted upon the counts charging him with uttering an “accountable receipt for goods.” The facts are plain. A woman, *Elizabeth Hopwood*, pledged with the prisoner certain goods, and the prisoner thereupon gave her the usual ticket. Her husband afterwards comes to the prisoner to redeem the goods which had been pledged by his wife, pays to the prisoner the amount for which they were pledged and the interest, delivers to him the pawn ticket or duplicate and receives from him a bundle which was supposed to contain the goods which had been so pledged, but it afterwards turned out that part of such goods only had in fact been returned to him. On this the husband takes proceedings before the magistrates, under the 14th section of the statute, to compel the prisoner to deliver up the goods, and the attorney upon that occasion produced a false and fabricated ticket. That ticket must, on the finding of the jury, be taken to have been produced by the attorney with the full sanction of the prisoner; and such production was as much an uttering by him as

1857. if he had delivered it with his own hand. Then comes the question, is the instrument an accountable receipt? I am of opinion that it is. The Pawn-brokers' Act requires that a note or memorandum in certain terms shall be given to the person pledging the goods; and this ticket is substantially in the form required by the Act. It is a receipt for the goods pledged with the pawnbroker, upon the production of which, and payment of the principal and interest due, the party would be entitled to demand the goods. It is therefore clearly an accountable receipt for goods within the statute.

The other learned Judges concurred.

Conviction affirmed.

1857.

REGINA v. JOHN LEWIS.

The prisoner was convicted of manslaughter. The prisoner and the deceased were foreigners, and the latter died at *Liverpool* from injuries inflicted by the prisoner on board a foreign ship on the high seas. *Held*, that the offence was not cognizable by our law, and that the conviction was wrong.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by MARTIN B.

The prisoner was indicted at the last *Liverpool* Assizes for manslaughter, and found guilty. He was a *Frenchman* by birth, and a naturalized citizen of the United States of *America*, and not a subject of the Queen. On the 21st *December*, 1856, he shipped on board the *American* ship *Guy Mannering* at *New York*, and signed articles to serve as an able seaman therein on a voyage from thence to *Liverpool*. The deceased, *George*, also shipped on board the same vessel at *New York*, and signed articles to serve as a seaman therein for the same voyage. He was a *German* by birth, and not a subject of the Queen. The *Guy Mannering* was *American* owned, commanded

by an *American* master, and sailed under the flag of the *United States*. Soon after the commencement of the voyage the convict and others exercised much cruelty towards the deceased. The last act of cruelty proved was committed four days before the *Guy Mannering* arrived at *Liverpool*, and when she was upon the high seas, west of *Cape Clear* in *Ireland*. The *Guy Mannering* arrived in the *Mersey* in the morning of the 12th *January*, 1857, and the deceased died in an hospital at *Liverpool* in the afternoon of the same day, in consequence of the cruelty and violence committed upon him by the prisoner and others during the voyage. The question upon which I request the opinion of the Court of Criminal Appeal is, whether the convict was subject to be tried and convicted at the assizes for *Liverpool*. The statute 9 *Geo.* 4. c. 34. s. 8. was relied upon on behalf of the prosecution.

1857.

LEWIS'S
Case.

SAMUEL MARTIN.

April 5th, 1857.

This case was argued on 25th *April*, 1857, before COCKBURN C. J., COLERIDGE J., MARTIN B., CROMPTON J. and WILLES J.

Aspinall appeared for the Crown; no counsel appeared for the prisoner.

Aspinall, for the Crown. The question is whether, under the circumstances of this case, an offence was committed cognizable by our laws? The deceased and the prisoner were both foreigners serving on board a foreign vessel. The blow which caused the death was struck upon the high seas, and the deceased died in this country. In *Regina v. Conolly*, tried at the *Liverpool* Spring Assizes, 1856, the prisoner, who was convicted, was a *British* subject; but in all other respects the facts were similar to those in the present case. It may be admitted that the Court had no

1857.

LEWIS'S
Case.

jurisdiction unless the prisoner is triable under sect. 8 of the 9 *Geo.* 4. c. 31., which enacts, "that where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of *England*, shall die of such stroke, poisoning, or hurt in *England*, or being feloniously stricken, poisoned, or otherwise hurt at any place in *England*, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of *England*, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or manslaughter or of being accessory before the fact to murder, or after the fact to murder or manslaughter, may be dealt with, inquired of, tried, determined and punished in the county or place in *England* in which such death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been wholly committed in that county or place." It would appear that the Legislature intended by this enactment to make a foreigner liable to our law in cases of this kind. In 1 *East's P. C.* 365, it is said, "It seems to have been a matter of great doubt whether the killing of one, who died at land of a wound received at sea, could be inquired of by the common law (certainly not, at least by the ordinary commissions of oyer and terminer within a county), because, though the place where the stroke was given might pertain to the realm of *England*, yet not being within the body of any county, no *venire* could come from thence, neither could the admiral inquire of it, because the death happened out of his jurisdiction."

The passage goes on to shew that the inquiry could not be by special commissioners under 27 *Hen.* 8. c. 4., or 28 *Hen.* 8. c. 15., which are confined to murders at sea, and that it could not be inquired of by the constable and marshal, which was the opinion of Lord *Coke*, founded on the statute 13 *Rich.* 2.

stat. 2. But (says *East*) according to Lord *Hale*, it might be determined in B. R., sitting in the county where the party died, or by a special commission of oyer and terminer; and, after intimating that 33 *Hen.* 8. c. 23. might perhaps extend to such a case, *East* goes on to say (p. 336), that for taking away all doubts 2 *Geo.* 2. c. 21. was passed, which contains provisions that where any person shall be feloniously stricken or poisoned upon the sea and shall die of the same in *England*, he may be tried in *England*. The last mentioned statute was repealed by 9 *Geo.* 4. c. 31., and section 8 of that statute contains the provision I have before referred to, which would seem in terms to apply to this case, except that the words “feloniously stricken” create a difficulty in construing the section so as to include the subjects of a foreign State. The 7th section of the same statute provides that *British* subjects may be tried in *England* for murder or manslaughter committed abroad.

1857.

 LEWIS'S
Case.

COLERIDGE J.—Before coming to the construction of the statute we must consider whether we have any right to legislate here for foreigners on board ships upon the high seas. How can we say whether one foreigner wounding another on the high seas commits a felony? Suppose by the law of a State the murder of a subject was not a capital offence, should we have power to say that when committed on the high seas by a foreigner we had the right to make it capital?

MARTIN B.—Suppose all that occurred had taken place on board a *French* ship, would the prisoner be triable by *French* or *English* law?

CROMPTON J.—It would be a felonious stroke if given by a *British* subject, but there can be no right to make it so against the subject of another State.

COCKBURN C. J.—It seems to me that the 7th and 8th sections must be taken together, and that the 8th section relates to the same class of persons as the

1857. 7th, namely, *British* subjects; and therefore there
 LEWIS'S was no jurisdiction to try this case.

Case.

COLERIDGE J.—I am entirely of the same opinion.

Cur. adv. vult.

The judgment of the Court was delivered on 2nd
May, 1857, by

WILLES J.—We are of opinion that the conviction is wrong, and ought to be quashed. I should say that, although my brother CROMPTON concurs in this judgment, he is not answerable for the reasoning on which it is founded. The rest of the Court think the reasons right.

The 8th section of 9 *Geo.* 4. c. 31. was obviously intended to prevent a defeat of justice which, without it, might have arisen, from the difficulty of trial, in cases of homicide where the death occurs in a different place from that at which the blow causing it was given, and that section ought not therefore to be construed as making a homicide cognizable in the Courts of this country by reason only of the death occurring here, unless it would have been so cognizable in case the death had ensued at the place where the blow was given, which the homicide, in this particular case, would have been, by the 7th section, if the offender had been a *British* subject, but not otherwise.

In the present case the injury which caused the death was inflicted by one foreigner upon another on board a foreign vessel upon the high seas; and consequently, if death had then and there followed, no offence cognizable by the law of this country would have taken place.

The 8th section of 9 *Geo.* 4. c. 31. therefore is inapplicable, and, unless it be applicable, the conviction cannot be sustained. It must therefore be quashed, and the prisoner discharged. Conviction quashed.

Leigh v. Fitch 578 n

REGINA v. CHARLES FITCH.

16 7 Cno 269

1857.

THE following case was reserved on the *Norfolk* Spring Circuit, 1857, at *Bury*, by ERLE J., and stated by him for the consideration and decision of the Court of Criminal Appeal.

The indictment was for larceny, stealing a bonnet, boots, goloshes, the property of *James Reeve*; the verdict was guilty. The facts were, that the prisoner, being a lodger in *Reeve's* house, agreed with his wife that they should go away and live together in adultery. He went away leaving the husband and wife together, then the husband went out to work and then the wife went after the prisoner. They were followed and overtaken on the road in company together and he was apprehended, and at that time he was carrying a band-box containing goloshes and boots, the wearing apparel of the wife of the prosecutor, and so in law his property. The judgment was respited, the prisoner remaining in custody till the opinion of this Court could be taken on the question, whether on these facts the conviction was right. See *Thompson's Case*, 1 Den. C. C. R. 549; *Featherstone*, Dears. C. C. R. 369.

W. ERLE.

This case was considered on 2nd *May*, 1857, by COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

No counsel appeared for the Crown.

Tozer appeared for the prisoner, and contended that the conviction was wrong on two grounds. First,

The prisoner was convicted on an indictment charging him with stealing certain articles the property of the prosecutor. It appeared that the prisoner, who lodged in the house of the prosecutor, agreed with his wife that they should go away and live together in adultery. The prisoner left the house and the wife of the prosecutor followed him and they were overtaken on the road in company together, the prisoner carrying a band-box containing the articles mentioned in the indictment, being, in fact, part of the wearing apparel of the prosecutor's wife. Held, that the conviction was wrong.

1857.
FITCH'S
Case.

that there was no larcenous taking by the prisoner; and secondly, that the goods charged to have been stolen were the wearing apparel of the wife.

COCKBURN C. J.—In the cases referred to the prisoner took away the money of the husband; but here he was only assisting in carrying away the necessary wearing apparel of the wife.

Tozer referred to *Regina v. Rosenberg (a)*. He was then stopped by the Court.

COCKBURN C. J.—We all agree that this conviction cannot be sustained.

Conviction quashed.

(a) 1 Car. & K. 233. See also *Clark's Case*, 1 Moo. C. C. 376, note (a); *Rex v. Tolfree*, 1 Moo. C.C. 243; Dalton's Justice, ch. 157, parag. 17, p. 504, ed. 1727. These

are the words of the paragraph:—
“If a married woman shall deliver to her adulterer her husband's goods, this is felony in the adulterer.”

1857.

REGINA v. RICHARD HUGHES.

The prisoner was convicted on an indictment for perjury on the hearing of an affiliation summons.

The applicant

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by BRAMWELL B.

The prisoner was convicted before me at the last Assizes for *Merionethshire*, on an indictment for perjury

for the summons had returned from service to the house of her parents to be confined; and, after remaining there for eight months, during which time she had no other home, she went to lodge at *D.* for the purpose of affiliating her child. *D.* was not in the same petty sessional division as the residence of her parents; but she went to *D.*, not fraudulently or for any improper reason, but from motives of convenience; and after lodging at *D.* for three weeks she applied for and obtained the summons in the petty sessional division in which *D.* was situate. She stated that she meant to leave *D.* immediately after the order, and she did leave the day after the order was made and went into service without returning to her parents. The jury found she had no other home than *D.*, and that she was residing there if in point of law she could, under the circumstances, be considered to be so. *Held*, that her residence was at *D.*, and therefore that, the magistrates of the petty sessional division in which *D.* was situate having jurisdiction, the conviction was right.

on an affiliation summons. The statutes are 7 & 8 *Vict.* c. 101. s. 2. and 8 & 9 *Vict.* c. 10. s. 10. The applicant, the mother of the child, had been in service, where she continued till she returned to her parents to be confined. She was delivered of a child *March* 21st, 1854, and continued to reside with her parents till *November*, 1854, and during that time had no other home. She then went to lodge at *Dolgelly* for the purpose of affiliating the child. The Petty Sessional Division to which she applied included *Dolgelly*, but did not include the residence of her parents. Her going to *Dolgelly* and lodging there was not fraudulent or for any improper reason, but because the magistrates met in the town, and it was more convenient for her than to go a distance from the home of her parents to the place of meeting of the magistrates for the division in which her parents resided. After the order of affiliation she went into service without returning to her parents. She stated she could not go back to her parents as they had nothing for her to do, but that she meant to leave immediately after the order was made, and that she did leave the next or following day. The summons was applied for and issued *December* the 5th, three weeks after she first came to lodge at *Dolgelly*. The jury found she had no other home than *Dolgelly*, and that she was residing at *Dolgelly*, if in point of law she could, under the circumstances, be considered to be so. It was objected that she was not residing within the Petty Sessional Division to which she had applied, and consequently that the magistrates had no jurisdiction. I reserved that question for the Court of Criminal Appeal, but passed sentence on the prisoner.

1857.

HUGHES'S
Case.

G. BRAMWELL.

This case was argued on 2nd *May*, 1857, before

1857.

HUGHES'S
Case.

COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

Morgan Lloyd appeared for the prisoner ; no counsel appeared for the Crown.

Morgan Lloyd, for the prisoner. The question is whether the mother of the child was residing at *Dolgelly* at the time when she applied for the summons ; unless she was, the magistrates had no jurisdiction, and therefore the offence of perjury was not committed. I contend that her residence at that time was with her parents ; her residence at *Dolgelly* was not sufficiently permanent to satisfy the requirements of the statute.

COCKBURN C. J.—I should agree with you if it was stated that she intended to go back to her parents ; but she went into service, and there is nothing in the case to shew that she intended to go back to her parents.

CROWDER J.—Where did she reside ?

M. Lloyd. With her parents, and she only left that residence for a temporary purpose, namely for the purpose of affiliating the child. I can find no definition of the word residence, but at all events it is essential that the being in a place should have something permanent about it, and not be merely of a temporary character. No doubt when she left her father and mother she intended, after her application to the justices, to return to the district.

COCKBURN C. J.—That is not stated in the case, but assuming it to be so there was no *animus redeundi* to her father's house.

M. Lloyd. That is not necessary. It is sufficient if there be the *animus redeundi* to the district ; and it is clear that there was, for she went to *Dolgelly* to apply for the order, and for nothing else. The object of the statute was to compel the mother to apply for

the order in a district where she is known, and to prevent a woman from running about the country and applying for an order at any place she may choose. If it had been intended that a mere temporary residence should be sufficient, nothing would have been easier than for the Legislature to have used the words "wherever she shall happen to be," and so have shown such intention. The provision was in fact framed upon consideration of the convenience of both parties concerned. For the woman it was convenient that she should be able to apply at the place where she resided, and to compel the man to attend there however distant his residence might be, while, on the other hand, the man was saved from the inconvenience and injustice which must arise if the woman could go to any distance and compel his attendance there. If this residence is sufficient, a woman lodging in *London* might go to *Liverpool* with the intention of returning to *London* (though not to her lodgings) and obtain an order at *Liverpool*. Such a proceeding would clearly be a fraud upon the statute, the intention of which was that she should apply at a place where she was reasonably known; at all events that she should not apply at a distant place where she was unknown, and to which she went for the express purpose of making the application.

COLERIDGE J.—Is it the less a residence because she went to *Dolgelly* and resided there for the purpose of obtaining the order? To enable you to obtain the advantage of some schools a residence in a particular town is necessary. Is it the less a residence in the town because a parent goes and resides there for the purpose of obtaining the advantages of the school?

M. Lloyd.—It could not be said that the parent lost his former and permanent residence by doing so. Here the woman going to *Dolgelly* was simply a person

1857.

 HUGHES'S
Case.

1857.
HUGHES'S
Case.

going of an errand. It was, as was said by Lord *Kenyon* in *Rex v. The Duke of Richmond* (a), "a mere passage residence." It is the same as if the application had been made on the first day she went to *Dolgelly*; she went for that purpose, and that purpose only; if she had gone there *bonâ fide* for another purpose the question might have arisen,—how long must she have resided there in order to constitute a sufficient residence? But here it is the same as if she had made the application the moment she arrived there.

COLERIDGE J.—Where could she have applied at the time when she did apply? She says she had left her father's house, and that she could not go back, as her parents had nothing for her to do. If you are right I think it comes to this, that there was no place where she could have applied.

M. Lloyd. I contend that she resided with her father, and merely went to *Dolgelly* for the temporary purpose of obtaining the order. When she formed the intention of applying, and when she took the first step towards applying by leaving home, she was with her father and mother. It has been decided, in *Regina v. Cooke and Another* (b), that a woman may make an application of this kind after a former application has been dismissed on the merits, and if she can make such an application not only as often as she pleases, and also at any place to which she may choose to go for that purpose, she may harass a man by continual and distant applications. This is a new point, and it is one of great importance.

COCKBURN C. J.—We are all agreed that this conviction was right. I agree that it is not competent to a woman fraudulently to go to another place to affiliate her child for the purpose of avoiding the

(a) 6 T. R. 560.

(b) 2 Den. C. C. 462.

jurisdiction in which she resides, or for the purpose of harassing the defendant; but here it is expressly found that she did not go out of the district in which her parents resided for any purpose of that kind. The magistrates met in *Dolgelly*, and therefore it was more convenient to her to go there. It does not appear that she intended to return to the district which included the residence of her parents. She resided at *Dolgelly* when she made the application, and the jury find that at that time she had no other home; she was therefore residing at *Dolgelly*.

1857.

 HUGHES'S
Case.

COLERIDGE J.—I am of the same opinion. Mr. *Lloyd* relied on the woman's purpose in going to reside at *Dolgelly*; suppose she had gone there for that purpose and for no other, and when she arrived there she got a place, and stayed there for twelve months, it will not be said she would not then have resided there; the mere purpose for which she went will not, in the absence of fraud, prevent the place from being her residence.

CROWDER J.—The jury having found the woman had no other home, she must be residing at *Dolgelly*.

WILLES J.—She was neither actually nor constructively residing with her parents.

BRAMWELL B.—Every woman resides somewhere. The jury have found she did not reside anywhere else, so that unless she resided at *Dolgelly* she resided nowhere.

Conviction affirmed.

1857.

REGINA v. FREDERICK TOOLE and Others.

The prisoners were convicted of felony. The only evidence of the Christian name of the prosecutor was the statement of a witness, who said that he had seen the prosecutor sign his name to the charge against the prisoners, and to his deposition before the committing magistrates. Both those documents were produced to the witness, but only so much of them was read as shewed that they were signed "*Thomas Bent*." The witness then said, that from the signatures to those documents he knew the prosecutor's name was *Thomas Bent*; but that, except from

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by CHANNELL B.

Frederick Toole, Ambrose Lee, and John Reading were tried before me at the last Assizes for the county of *Kent* on a charge of feloniously assaulting *Thomas Bent* on the 19th *February*, 1857, and stealing from his person a watch his property. The three prisoners, on the night of the 18th or morning of the 19th of *February*, in a public street at *Chatham*, violently assaulted a person then known to the several witnesses called for the prosecution, and who was described by them in their evidence as Lieutenant *Bent*, of the Royal Marines, of her Majesty's ship *Iris*, then fitting out at *Sheerness*. For the purposes of this case it is to be taken that, from the person so known as Lieutenant *Bent*, the three prisoners stole a watch his property. Lieutenant *Bent* was not called at the trial. It was proved that at the time of the trial he was in service in foreign parts on board the *Iris*. After the case for the prosecution was closed, it was objected by the counsel for the prisoners that no proof had been given of the Christian name of the prosecutor as described in the indictment. The prosecutor's counsel, by permission, recalled a witness named *Richard Hulse*. He deposed as follows:—I know Lieutenant *Bent*, of the Royal Marines. I saw him sign his name

having seen him sign his name on those two occasions, he had no knowledge of his Christian name. *Held*, that this was admissible and sufficient evidence of the Christian name of the prosecutor, and that the conviction was right.

twice. I saw him sign this writing. [The writing referred to was a complaint and charge in respect of the same assault and stealing, for which the prisoners were tried before me, and was made by Lieutenant *Bent* against the prisoners before certain magistrates of the county of *Kent*.] I saw him sign it at the magistrate's office. He signed it on *Friday* the 20th of *February*. On the following day I saw Lieutenant *Bent* sign this writing. He did so in the presence of the prisoners. [This last writing was the deposition of Lieutenant *Bent* in support of the same charge, and was taken before the magistrates in the presence of the prisoners.] From these signatures I know his name to be *Thomas Bent*. On cross-examination the witness stated, Except so far as I know the fact from having seen Lieutenant *Bent* sign his name on these two occasions, I know nothing about his Christian name. So much only of the complaint and deposition was then read as showed that the papers, so proved to have been signed by Lieutenant *Bent* in the presence of the witness *Hulse*, had been signed "*Thomas Bent*." The prisoner's counsel objected to the admissibility of any part of either of the documents for any purpose. The above is the only evidence of the name of the prosecutor as laid in the indictment. I reserved for the opinion of the Court the question as to the admissibility, and, if admissible, the sufficiency of the evidence.

The jury found the prisoners guilty. I respited sentence upon the conviction, and the prisoners are in custody.

The question for the opinion of the Court is, Whether the above evidence was admissible and sufficient evidence to prove the name of the prosecutor as laid in the indictment?

W. F. CHANNELL.

1857.

TOOLE'S
Case.

1857.

 TOOLE'S
Case.

This case was argued on 2nd *May*, 1857, before
COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES
J. and BRAMWELL B.

Bushby appeared for the prisoner *Reading*. No
counsel appeared for the Crown or for the other
prisoners.

Bushby. There was no legal evidence of the
Christian name of the prosecutor, inasmuch as the
documents in question ought not to have been admitted
to prove it. Neither the charge nor the deposition
was admissible in evidence, the prosecutor not being
dead, or insane, or unable to travel.

COLERIDGE J.—The depositions were not put in.
Suppose the evidence had been, “I saw him write a
letter; this is the letter.”

Bushby. If they were not admissible, parol evi-
dence of their contents was not admissible. The
witness might have been allowed to prove the fact that
he saw the prosecutor put pen to paper, but not that
he wrote “*Thomas Bent*.” What was there written
could only be evidenced by the writing itself, and that
writing was not admissible. In the case suggested as
to the letter, the letter must have been put in to show
what he had written.

BRAMWELL B.—Suppose the witness, instead of
seeing the prosecutor write his name, had heard him
make in open Court a solemn affirmation in that
name.

Bushby. What the prosecutor signed would be
evidence against himself, but not against third parties;
there are often circumstances which induce a person
to conceal his real name.

COLERIDGE J. That observation applies to the value
of the evidence, not to its admissibility.

Bushby. Strict proof is required of the Christian
name in order that the prisoner may be able to plead

autrefois acquit, or *autrefois convict*. The learned counsel referred to Lord *Cardigan's* case.

COCKBURN C. J.—We do not say that the documents were receivable in evidence, nor were they so received. But we have no doubt that the statement of a man who has seen another sign a document is admissible as evidence of the name of that other, although no doubt it is evidence open to observation to the jury. The conviction therefore must be affirmed.

Conviction affirmed.

1857.

TOOLE'S
Case.

9 Cr Cr Cas 498
Cockburn J. v. Andrew M'Pherson
REGINA v. ANDREW M'PHERSON.
JG 1857 281

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal, by the Recorder of *Manchester*.

Andrew M'Pherson was tried before me at the *Manchester City Sessions*, on the 28th *February*, 1857, on an indictment for breaking and entering, on the 19th *February*, 1857, the dwelling-house of *Mark Fowler*, at *Manchester*, and stealing therein eight silver spoons, eight other spoons, one dress, one umbrella, two waistcoats, two brooches, and one pair of stays, his property, of the value of 10*l*. Prisoner pleaded not guilty.

The latter end of *January* the prosecutor went to spend some time in the country. The house in *Manchester* was locked up and left without any

The prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods, specified in the indictment, the property of the prosecutor. At the time of the breaking and entering the goods specified were not in the house, but there were other goods there the property of the prosecutor.

The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein. Held, that the conviction was wrong, as there was no attempt to commit the "felony charged" within the meaning of section 9 of 14 & 15 *Vict. c. 100*.

1857.

M'PHER-
SON'S
Case.

person in it. His wife came over to *Manchester* generally once a week to see that all was safe, and the last time she was there before the 19th of *February* was on *Wednesday* the 11th. The house was then all right, and all the articles mentioned in the indictment safe and in the places where she had left them. On the 19th of *February*, a little after five o'clock in the evening, prisoner and another man with him were standing at the front door of prosecutor's house. Prisoner was next to the door, which he unlocked, opened and went into the house, and the other man followed him into the house and pushed the door to behind him. The witness who saw this went directly to a Mr. *Lord*, who lived next door but one to the prosecutor, and he went instantly to prosecutor's house. The door was not fastened. He pushed it open and went in, and saw the prisoner coming down stairs, and called out to him, Hollo! what are you doing there? On his calling out the other man who had entered with the prisoner came out of the kitchen, rushed forcibly past the witness in the lobby, got out at the front door and escaped. The prisoner ran down the stairs and made for the back door. The witness followed, caught hold of his coat lap just as he got out of the door, prisoner's coat lap slipped through his hand, but he followed him, and prisoner fell about eighty yards from the house, and the witness secured him. Upon the prisoner nothing whatever was found except a skeleton key with which he had unlocked the prosecutor's door. The man who came out of the kitchen had nothing in his hand, and nothing had been taken out of the kitchen. On examining the house, after the prisoner was taken, the rooms up stairs were all in confusion, things were very much upset, drawers broken open, and to such an extent, both there and in the parlour down stairs, as

to make it quite impossible that all this could have been done by the prisoner and his companion between the time that they entered the house and the time when they were disturbed by *Lord*, which could not have been more than from two to three minutes. All the articles mentioned in the indictment were missing, and all of them, with the exception of the umbrella, which was taken from the parlour, had been taken from different rooms up stairs; and the jury were of opinion that all the articles mentioned in the indictment had been stolen from the house by some person or persons, whom they could not say, before the time when the prisoner so broke and entered it as aforesaid. There were other goods and chattels of prosecutor's still remaining in the house which the prisoner might have taken.

1857.

M'PHER-
SON'S
Case.

The jury, by their verdict, found that the prisoner was not guilty of the felony charged, but that he was guilty of breaking and entering the dwelling-house of the prosecutor, and attempting to steal his goods therein.

The question for the opinion of the Court is, Whether this verdict can be supported on this indictment, none of the articles named in the indictment having been in prosecutor's house at the time it was so broken and entered by the prisoner?

Sentence is deferred. The prisoner remains in gaol.

R. B. Armstrong,

Recorder of *Manchester*.

This case was argued on 2nd *May*, 1857, before COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

Samuel Taylor appeared for the Crown; no counsel appeared for the prisoner.

S. Taylor, for the Crown. The point is, can the

1857.

 M'PHER-
 SON'S
 Case.

prisoner, under the circumstances here stated, be convicted of attempting to commit the felony charged in this indictment? The particular felony charged is the breaking and entering the dwelling-house of the prosecutor, and stealing therein the articles enumerated in the indictment, but none of such articles were in the prosecutor's house at the time when it was broken and entered by the prisoner. I contend that the prisoner can, under section 9 of the 14 & 15 *Vict.* c. 100., be convicted of an attempt to commit the felony charged. That section enacts, "that if on the trial of any person charged with any felony or misdemeanor it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same."

COCKBURN C. J.—Now follow that out. The effect of the statute is, that if you charge a man with stealing certain specified goods, he may be convicted of an attempt to commit "the felony or misdemeanor charged;" but can you convict him of stealing other goods than those specified? If you indict a man for stealing your watch, you cannot convict him of attempting to steal your umbrella.

COLERIDGE J.—When the prisoner broke into the house, he might have *intended* to steal the goods mentioned in the indictment; but you must not confound *attempt* with *intent*.

S. Taylor. An attempt need not be one which might be successful. Suppose a man was indicted for attempting to steal a 5*l.* note from the person of

another, and it was proved that his hand was in the prosecutor's pocket, but the 5*l.* was not there?

1857.

M'PHER-
SON'S
Case.

COCKBURN C. J.—Here the prisoner had the *intention* to steal before he went into the house; but when he got there the goods specified in the indictment were not there; how then could he *attempt* to steal those goods? There can be no attempt *asportare* unless there is something *asportare*. There is a difference between intending to do a thing and attempting to do it. A man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. How can he be said to have attempted to commit the murder? He merely attempts to carry an intention into effect.

S. Taylor. I submit there might be a general verdict of attempting to steal the goods of the prosecutor; it would be sufficient to charge a breaking and entering with intent to steal the goods of the prosecutor without specifying the particular goods.

COCKBURN C. J.—A man may have goods which are not the subject of larceny.

BRAMWELL B.—The argument that a man putting his hand into an empty pocket might be convicted of attempting to steal, appeared to me at first plausible; but suppose a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of attempting to murder the man he took it to be?

CROWDER J.—When you charge larceny, you must specify some articles, and prove that some one of those articles has been stolen. So when you charge an attempt to steal certain articles in a dwelling-house, you must prove that some one of those articles was there.

S. Taylor referred to *Regina v. Mitchell et al.* (a),

1857.

 M'PHER-
 SON'S
 Case.

where it was held, under section 11 of 14 & 15 *Vict.* c. 100., if a robbery under aggravated circumstances be charged in the indictment, the jury may find an aggravated felonious assault with intent to rob, and the persons found guilty of such an aggravated assault are liable to punishment under sections 3 & 10 of 7 *Wm.* 4 & 1 *Vict.* c. 87., *the assault following the nature of the robbery.*

COLERIDGE J.—Then, you say, it is sufficient to prove an attempt to commit a felony *ejusdem generis* with that charged in the indictment.

S. Taylor. Here the jury find that the prisoner was guilty of breaking and entering the dwelling-house of the prosecutor and attempting to steal his goods therein.

COCKBURN C. J.—I am of opinion that this conviction cannot be sustained. The prisoner was indicted for breaking and entering the dwelling-house of the prosecutor and stealing therein certain specified chattels. The jury found specially that, although he broke and entered the house with the intention of stealing the goods of the prosecutor, before he did so somebody else had taken away the chattels specified in the indictment. Now, by the recent statute it is provided, that where the proof falls short of the principal offence charged, the party may be convicted of an attempt to commit the same. The word attempt clearly conveys with it the idea, that if the attempt had succeeded the offence charged would have been committed, and therefore the prisoner might have been convicted if the things mentioned in the indictment or any of them had been there; but attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that which, if successful, would amount to the felony charged; but here the attempt never could have succeeded, as the things which the indictment charges the

prisoner with stealing had been already removed—stolen by somebody else. The jury have found him guilty of attempting to steal the goods of the prosecutor, but not the goods specified in the indictment.

COLERIDGE J.—I am entirely of the same opinion. He broke and entered the house with intent to steal, but he failed to do so as to the particular articles mentioned in the indictment, because these articles were not there to be stolen.

CROWDER J.—I am of the same opinion.

WILLES J.—The words of the statute are “attempt to commit *the same* :” that is, the offence charged in the indictment.

BRAMWELL B.—It is argued that the prisoner attempted to steal the goods of the prosecutor. Yes, but the fallacy is that he did not and could not attempt to steal the goods specified in the indictment, because they were not there; and the statement of such goods is not surplusage, because it describes the offence.

Conviction quashed.

1857.

M'PHER-
SON'S
Case.

REGINA v. COCKBURN.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Chairman of the Quarter Sessions for *Berwick upon-Tweed*.

It being proposed to give in evidence the deposition of a witness, his medical

attendant was called, who said he might have been brought to the Court without danger to his life, though he, as his physician, would not permit him to roam abroad if he knew it; and that he was suffering from an attack of paralysis which disabled him altogether from giving evidence. Another person proved that he had seen the witness the day previously in the street near the door of his shop. *Held*, that on this evidence the deposition was rightly received.

1857. *Cockburn's Case.* At the last *January Sessions* for *Berwick-upon-Tweed*, *Mark Cockburn* was indicted for stealing money from the person of *James Emery*. The prisoner pleaded not guilty, and it was proposed at the trial to give in evidence the deposition of *James Emery*, which was proved to have been duly taken according to the provisions of the 11 & 12 *Vict. c. 42. s. 17*.

To prove the state of health of *James Emery*, a medical witness was called, who gave the following evidence. "I am a physician in attendance on *James Emery*. I saw him this morning; he is not able to attend here in consequence of illness; he cannot speak, and I have never been able to make him hear. It is a second attack of paralysis; he had a former attack ten months ago, from which he recovered tolerably, but was not so strong as before. If brought here, he would not be able to give evidence; yet he might be brought here without danger to life, though I, as his physician, could not permit him to roam abroad if I knew it." At the suggestion of the prisoner's counsel I examined another witness, who said that he had seen *James Emery* in the street on the preceding day near the door of his shop. On this it was objected, that as *James Emery* had been out of the house, and might be brought to Court without danger to life, he was not so ill as to be not able to travel according to language of the statute, which was to be taken strictly; but that, in such a case, an application ought to have been made for the postponement of the trial; but I was of opinion, that, as it had been proved to my satisfaction that at the time of the trial *James Emery* was disabled from giving evidence by an attack of illness not plainly appearing to be temporary, his deposition was admissible, whether he had power of travelling or not. The deposition was therefore given in evidence, and the prisoner was

convicted. I postponed judgment, taking recognizance of bail for the appearance of the prisoner at the next sessions to receive judgment, in case this Court shall be of opinion that he was rightly convicted.

1857.

 COCKBURN'S
Case.

This case was considered on the 2nd *May*, 1857, by COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

No counsel appeared.

COCKBURN C. J.—We are all clearly of opinion that the conviction was right.

Conviction affirmed.

REGINA v. WILLIAM MILLS.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Chairman of the Quarter Sessions of the Peace for *Cambridgeshire*.

At the General Quarter Sessions of the Peace holden for the County of *Cambridge* on the 9th of *January*, 1857, *William Mills* was tried and convicted upon the following indictment for obtaining money under false pretences:—" *Cambridgeshire*, to wit. The jurors for our Lady the Queen upon their

The prisoner was convicted on an indictment for obtaining money by false pretences. The indictment alleged that the money was obtained by the prisoner by the false pretence that he had cut 63 fans of chaff when

in fact he had only cut 45 fans. It appeared by the evidence that the prisoner was employed to cut chaff at twopence per fan, and that on making the false pretence alleged in the indictment he demanded 10s. 6d. from the prosecutor. The prosecutor had previously seen the prisoner remove 18 fans from an adjoining place and add them to the heap which he pretended he had cut; but, notwithstanding this knowledge, he paid the prisoner the amount he demanded. *Held*, that the conviction was wrong, as the money was not obtained by means of the false pretence.

1857.
MILLS'S
Case.

oath present, that *William Mills* on the 14th day of *November*, 1856, did falsely pretend to one *Samuel Free* that the said *William Mills* had cut sixty-three fans of chaff for him the said *Samuel Free*, by which said false pretence the said *William Mills* then unlawfully did obtain from the said *Samuel Free* certain money of him the said *Samuel Free* with intent to defraud, whereas in truth and in fact the said *William Mills* had not cut sixty-three fans of chaff as he the said *William Mills* did then so falsely pretend to the said *Samuel Free*, but a much smaller quantity (to wit) forty-five fans of chaff. And the said *William Mills*, at the time he so falsely pretended as aforesaid, well knew the said pretence to be false, against the form of the statute," &c. It appeared from the evidence that the prisoner was employed to cut chaff for the prosecutor, and was to be paid twopence per fan for as much as he cut. He made a demand for 10s. 6d., and stated he had cut sixty-three fans, but the prosecutor and another witness had seen the prisoner remove eighteen fans of cut chaff from an adjoining chaff-house and add them to the heap which he pretended he had cut, thus making the sixty-three fans for which he charged. Upon the representation that he had cut sixty-three fans of chaff, and notwithstanding his knowledge of the prisoner having added the eighteen fans, the prosecutor paid him the 10s. 6d., being three shillings more than the prisoner was entitled to for the work actually performed.

It was objected, on behalf of the prisoner, first, that this was simply an overcharge, as in the case of *Regina v. Oates* (a), and secondly, that, as the prosecutor, at the time he parted with his money, knew the facts, the prisoner cannot be said to have obtained the money by the false pretence. Judgment was postponed, and

(a) Dears. C. C. 459.

the prisoner was discharged upon recognizances to appear at the next Quarter Sessions. The opinion of the Court of Criminal Appeal is requested, whether the prisoner was rightly convicted of misdemeanor under the foregoing indictment.

1857.

MILLS'S
Case.

Thos. St. Quinton,
Chairman.

This case was argued on 2nd *May*, 1857, before COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

Orridge appeared for the Crown; no counsel appeared for the prisoner.

Orridge, for the Crown. I submit that this conviction was right.

COLERIDGE J.—How do you say the money was obtained by the false pretence?

Orridge. When the owner of goods knows that a thief is coming and does not prevent him from taking the goods, the offence of larceny is as complete as it would have been if the owner had known nothing about it. *Regina v. Egginton (a)*.

WILLES J.—But in larceny the question does not turn on the belief of the prosecutor.

Orridge. In *Rex v. Adey (b)*, *Patteson J.* says:—“If the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not.” (c).

COCKBURN C. J.—The test is, what is the motive operating on the mind of the prosecutor which induced him to part with his money? Here the prosecutor

(a) 2 B. & P. 508.

(b) 7 Car. & P. 140.

(c) *Patteson J.* also said to the jury, “If you believe any one of the

pretences was false, and that the mind of the prosecutor was operated upon by it, then you will find him guilty.”

1857. knew that the pretence was false ; he had the same
MILLS'S knowledge of its falseness as the prisoner. It was not
Case. the false pretence, therefore, which induced the prose-
cutor to part with his money ; and if it is said that it
was parted with from a desire to entrap the prisoner,
how can it be said to have been obtained by means of
the false pretence ?

COLERIDGE J.—In *Rex v. Adey* it is said that the
prosecutor believed the false statement.

CROWDER J.—It is always a question whether the
prosecutor was induced to part with his money by
the false pretence.

WILLES J.—The prosecutor handed the money over
to the prisoner with a full knowledge of the true state
of the circumstances.

BRAMWELL B.—The prosecutor paid the money
with a knowledge of the facts. I doubt if he could
get it back in a civil action.

COCKBURN C. J.—The case is very clear. The
conviction is wrong.

Conviction quashed.

2 Nov. & Miller 347

REGINA v. ISAAC SOLLY LISTER AND
BENJAMIN BIGGS.

1856.

1857.

THIS case was tried at the Central Criminal Court on 21st *December*, 1855, when the following case was reserved and stated by ALDERSON B. for the consideration and decision of the Court of Criminal Appeal.

The defendants were indicted for a public nuisance in keeping and storing large quantities of wood naptha and rectified spirits of wine in a warehouse in *Suffolk Lane*, which runs between *Thames Street* and *Cannon*

The defendants were convicted on a count of an indictment which charged that they unlawfully, knowingly and wilfully did deposit in a warehouse belonging to them near to

divers streets and highways and to divers dwelling-houses of her Majesty's subjects, divers large and excessive quantities of a dangerous ignitable and explosive fluid called wood naptha, and did keep in the said warehouse and near to the said streets, highways and dwelling-houses, the said fluid in such large, excessive and dangerous quantities, whereby the Queen's subjects passing along the said streets and highways, and residing in the said dwelling-houses were in great danger of their lives and property and were kept in great alarm and terror *ad commune nocumentum*.

It appeared in evidence that naptha is very inflammable and if inflamed water could not put out the fire, unless applied in enormous quantities, and that a fire arising and communicating with the quantity kept upon the defendants' premises could not be quenched, and would produce very disastrous consequences to the neighbourhood. It also appeared that it was the practice never to allow any candles, fire, or gas light to be in the warehouse, and that so long as that continued the naptha would not produce danger.

Held, by Lord CAMPBELL C. J., COCKBURN C. J., COLERIDGE J., CRESSWELL J., ERLE J., CROMPTON J., CROWDER J., WILLES J., BRAMWELL B., WATSON B. and CHANNELL B.

1. That the said count disclosed an indictable offence.

2. That the above facts, taken together, fully justified the verdict of guilty.

3. That the jury were entitled to take into consideration the liability to ignition *ab extra*.

4. That it was a question for the jury, whether the keeping and depositing did create danger to life and property as alleged; and that, although the Judge would not have been justified in directing a verdict of guilty without taking the opinion of the jury upon it, he was fully justified in telling the jury, that if the depositing and keeping the naptha, coupled with its liability to ignition *ab extra*, created danger to life and property to the degree alleged, they might find a verdict of guilty.

Evidence was given on the trial that the defendants also stored on the same premises large quantities of rectified spirits of wine, and that the operation of mixing the wood naptha with the spirits of wine was carried on upon the premises.

Held, by POLLOCK C. B. (not dissenting from the ruling of the rest of the Court in point of law), that the conviction was wrong, because the defendants were indicted merely for *depositing* an article in a warehouse, and were convicted upon evidence of a dangerous *use* of it by mixing it with another article.

1857. *Street, in the city of London (a).* It appeared in evidence that the quantities so stored were from 4000

LISTER'S
Case.

(a) The following is a copy of the indictment :—

1st count. Central Criminal Court, to wit :—The jurors for our lady the Queen upon their oath present that *Isaac Solly Lister* and *Benjamin Biggs* severally late of *London* merchants not having regard to the lives and security of her Majesty's liege subjects heretofore to wit on the 24th day of *June* in the year of our Lord 1855 in *London* and within the jurisdiction of the said Central Criminal Court unlawfully knowingly and wilfully did deposit and cause to be deposited in a certain warehouse and premises of them the said *Isaac Solly Lister* and *Benjamin Biggs* and near to divers streets and Queen's ancient and common highways there and also to divers dwelling-houses of her said Majesty's liege subjects to wit in *Suffolk Lane* in *London* aforesaid divers large and excessive quantities of a certain dangerous ignitable and explosive fluid called wood naptha to wit 10,000 gallons of the said fluid and from the day and year aforesaid until the day of the taking of this inquisition in *London* aforesaid and within the jurisdiction of the said Central Criminal Court unlawfully knowingly and wilfully did keep in the said warehouse and premises and near to the streets highway and dwelling-houses aforesaid the said fluid in such large excessive and dangerous quantities as aforesaid by reason of which said premises the liege subjects of our said lady the Queen during the time aforesaid passing and proceeding in through and along the said streets and highways and the liege subjects of our said

lady the Queen near to the said warehouse and premises residing and being were in great danger and peril of their lives and property and were kept in great alarm fear and terror and were greatly impeded disturbed and incommoded in the performance of their lawful occupations and prevented and deterred from using the said streets and highways and from passing and repassing over through and along the same as otherwise and but for the premises aforesaid they could might and ought to have done, to the common nuisance of all Her Majesty's liege subjects and the endangerment of their lives and property and against the peace of our lady the Queen her crown and dignity.

2nd count. That the said *Isaac Solly Lister* and *Benjamin Biggs* on the said 24th day of *June* A.D. 1855 and on divers other days between that day and the day of taking this inquisition in *London* aforesaid and within the jurisdiction of the said Central Criminal Court (that is to say) in and upon the said warehouse and premises in *Suffolk Lane* aforesaid and near to divers streets and Queen's common and public highways there and also near to divers dwelling houses of divers liege subjects of our said lady the Queen there unlawfully knowingly and injuriously did put place and leave and cause and procure to be put placed and left divers large quantities of a certain offensive fluid and matter called wood naptha whereby and by reason whereof divers noxious injurious and unwholesome smells stinks and stench from the said

to 5000 gallons of wood naptha, and from 40,000 to 50,000 gallons of spirits of wine. The operation of mixing the two together was carried on upon the premises. For this purpose there were two large vats erected; each of them was capable of holding about 2000 gallons of the mixture. The vats were covered over entirely at the tops, with the exception of an aperture in the centre of the cover, in which was fixed a hopper with a sliding panel of wood. When it was necessary to mix, the spirits of wine first and the naptha afterwards were poured through the hopper into the vat below, where, by their chemical action

1857.

 LISTER'S
Case.

fluid and matter did then and there arise and thereby the air there became and was greatly infected tainted contaminated and corrupted, to the great and common nuisance of all her Majesty's liege subjects to the great prejudice and endangerment of public health and against the peace &c.

3rd count. That heretofore to wit on the 24th day of *June* A.D. 1855 and from thence continually to the day of the taking of this inquisition the said *Isaac Solly Lister* and *Benjamin Biggs* were manufacturers of a certain fluid called wood naptha and during all the time aforesaid carried on their trade and business as such manufacturers as aforesaid within the city of *London* to wit in *Suffolk Lane* in the said city and near to divers streets and *Queen's* ancient and common highways there and also to the dwelling houses of divers of Her Majesty's liege subjects in the said city And the jurors aforesaid upon their oath aforesaid do further present that the said *Isaac Solly Lister* and *Benjamin Biggs* not regarding their duty in that behalf nor the lives and health of her

Majesty's liege subjects during all the time aforesaid unlawfully knowingly wilfully and injuriously did so carry on their trade and business aforesaid to wit in the manufacture of wood naptha aforesaid in such a careless negligent and improper manner that in the manufacture aforesaid divers noisome noxious and unwholesome stinks smells and stenches were emitted sent forth and issued from the said manufacture and the air there in the streets and highways aforesaid and in and about the dwellings aforesaid was thereby greatly filled impregnated and contaminated with the said noisome noxious and unwholesome stinks smells and stenches and by the procurement and wilful permission of the said *Isaac Solly Lister* and *Benjamin Biggs* as aforesaid during all the time aforesaid was corrupted and rendered insalubrious and injurious to human life and health, to the great and common nuisance of her Majesty's liege subjects to the great prejudice and endangerment of public health and against the peace &c.

1857.

LISTER'S
Case.

upon each other, they became intermixed, and were drawn off at the bottom by a cock, and carried away for the purposes of commerce. The wood naptha was kept in the warehouse in carboys holding twelve gallons each, and carefully stocked till required for the purposes of being thus mixed. It is a product of the distillation of wood, and is very inflammable, more so than spirits, or even than gunpowder itself, passing into vapour on the application of a heat of 140° *Fahrenheit*, and if inflamed water could not put out the fire arising from it, unless that water was applied in enormous proportions relatively to the quantity of inflamed naptha; and Drs. *Taylor* and *Letheby* were of opinion, and as to this there was no dispute, that, practically, a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighbourhood; but it was proved also that it was the practice in the warehouse never to allow any candles, or fire, or gas light to enter therein, and so long as that continued, the storing of the wood naptha and the spirits would not produce danger; but it was contended on the part of the Crown, that to keep articles so easily liable to accident, and so dangerous in the result, if an accident happened, to a populous neighbourhood in which this manufactory was situate, was a public nuisance, inasmuch as fire might incautiously be introduced, or a fire arising in any of the adjoining houses might communicate therewith, and that the existence of such a manufactory, therefore, was a just ground for apprehension and alarm to the surrounding neighbourhood, and therefore a nuisance; and the case was compared to the keeping of a large magazine of gunpowder (2 Strange, 1167, *Rex v. Taylor*), which was said to be a nuisance at the common law. The defendants

were, by my direction, found guilty, but I respited the judgment, and request the opinion of the Judges on the point, whether, when the manufacture, as carried on, (which was carefully), produced in the opinions of the scientific men no danger, its liability to danger *ab extra* made it a public nuisance?

1857.

 LISTER'S
Case.

This case was argued on 19th *January*, 1856, before POLLOCK C. B., ALDERSON B., COLERIDGE J., WILLIAMS J. and WILLES J.

James Wilde Q. C. (*Ryland* with him) appeared for the Crown, and *Parry* for the defendants.

Parry, for the defendants. This is not in any respect an indictable offence. In this country no man can be indicted unless he has done some act to the injury of another; and no man is indictable for a nuisance unless he has committed some act or is guilty of some omission to the injury of the public. This warehouse of the defendants is kept, as the case shows, with the greatest possible care, and the mere possibility of danger *ab extra* is not matter for an indictment at common law.

This is in the nature of a prohibition *quia timet*. On a motion for an injunction to stay the building of a house to inoculate for the small pox, Lord *Hardwicke* said, that the fears of mankind, though they might be reasonable ones, would not create a nuisance, and he refused to grant the injunction (a). It is as if one man had a loaded blunderbuss, and another man was afraid that he should fire it, or that injury would arise by its bursting.

In *London* many manufactures are carried on, which, if not properly managed, may be dangerous; for instance, a chemist's laboratory, say the laboratory

(a) Anon. 3 Atkyns, 750; 2 Roll. p. 199, c. 75, s. 11, and 1 Lut. 169, Abr. 139, 140; Hawk. P. C. b. 1, were referred to.

1857.

 LISTER'S
Case.

of Dr. *Taylor* himself, would, if not properly controlled, be highly dangerous. Who is to say at what point such a business or manufacture ceases to be lawful? This Court will not sit as a Court of chemical investigation.

No form of an indictment for nuisance is to be found in which the alarm of the inhabitants is treated as creating an indictable offence. This case expressly finds that it was the practice never to allow any candles, fire or gas-light on the premises, and that, so long as that course was pursued, the storing of the wood naphtha and the spirits of wine would not produce danger.

The only case on which the prosecutors can rely is that of *Rex v. Taylor* (a). The report of that case is contained in three lines. "The Court granted an information against him as for a nuisance, on affidavits of his keeping great quantities of gunpowder to the endangering the church and houses where he lived" (b). It does not appear how the defendant in that case kept the gunpowder, or where he kept it; there is in the report an entire absence of any statement of the facts, and it may well be that the affidavits showed that the gunpowder was kept in such a way as to be dangerous.

WILLIAMS J. referred to *Regina v. Watson* (c), where the occupier of a house, standing upon the highway, which was ruinous and likely to fall down, was held indictable on account of the danger to the public, though charged in the indictment as liable to repair *ratione tenuræ*, and it appeared that the defendant was tenant at will and not liable as between himself and his landlord.

(a) 2 Strange, 1167.

(b) In Burn's Just.tit. *Gunpowder* it is said, "or rather it should have been expressed to the endangering

the lives of his Majesty's subjects."

(c) 2 Lord Raym. 856; S. C. nom. *Regina v. Watts*, 1 Salk. 357.

Parry. The foundation of that decision was that the defendant was guilty of a breach of public duty; and in the judgment, in the report in *Salkeld*, it is said: "the house was a nuisance *as it stood*, and the continuing the house in that condition is continuing the nuisance."

1857.

 LISTER'S
Case.

ALDERSON B.—In that case the laws of nature alone would inevitably cause the house to fall unless it was propped. It was a dangerous thing as it stood.

Parry. Here the thing is not dangerous as it exists, and the fears of mankind, though reasonable, are not sufficient to make the thing creating such fears a nuisance; and this is but reasonable, for if such an argument as that raised on the part of the prosecution should prevail, the jury must in every case be the judges both of the law and the facts; to decide in favor of the Crown will be to decide in favor of restraint of trade, which is abhorrent to the common law.

POLLOCK C. B.—Some years since some persons were drowned by the bursting of a large brewer's vat. Could the brewers of the Metropolis be indicted for having such vats upon their premises because persons were afraid of a similar occurrence?

ALDERSON B. referred to *Rex v. Vantandillo* (a), in which it was held that a person might be indicted for unlawfully carrying a child infected with the small pox along a public highway in which persons are passing, and near to the habitations of the King's subjects.

COLERIDGE J.—The act charged here is the collecting together large quantities of combustible material to such an extent as to be dangerous to the public.

Parry. Only to such an extent as to rouse the

1857.

 LISTER'S
Case.

fears of the public. All our sanitary acts show that carrying on a trade, which is itself a lawful act, cannot be a nuisance unless it be so carried on as actually to injure others. Here there is no danger in the existing state of things, but there is danger in certain possible events.

ALDERSON B.—In the large houses in the City great numbers of bales of cotton are warehoused, which, if oil was poured on them, would ignite, and might produce a fire equal to the great fire of London.

Parry. Circumstances may occur under which the carrying on of any manufacture or the warehousing of any article would be dangerous; but in order to restrain trade by injunction, or punish those who carry it on by indictment, it must be shown that actual injury arises, and it is not sufficient to show that the thing done has created alarm, and roused even the reasonable fears of mankind.

James Wilde Q. C., for the Crown. It cannot be successfully contended that, before an indictment will lie, something must have been done by which some one has received a positive injury. Surely there may be some degree of danger so imminent as to render it unnecessary to show that an actual injury has been inflicted.

In the case in *Atkins*, the meaning of Lord *Hardwicke* is, “if this is a case in which there is sufficient danger to constitute a nuisance at all, it is a public nuisance; but it is not settled that a house for the reception of inoculated patients is a nuisance; had it been a nuisance, the proper mode of proceeding would have been by information in the name of the Attorney General.”

POLLOCK C. B.—What would you say is the definition of a nuisance in a case of this kind?

Wilde Q. C. That it is dangerous. There is danger

so great, so imminent, so excessive, that it would be a nuisance *per se*. 1857.

POLLOCK C. B.—Is that for the jury?

LISTER'S
Case.

WILDE Q. C.—Under the direction of the Judge, who would direct the jury what amount of danger was sufficient; and I should submit that, at all events, the danger is sufficient where the thing feared can only be prevented by the most extraordinary care, and where, as in this case, it may at any time be produced by the most common accidents of life amongst careful people.

The mixing naphtha with spirits of wine was caused by an Act of Parliament (18 & 19 *Vict.* c. 38.) introduced on revenue considerations. It was considered expedient, with a view to promote the advancement of arts and manufactures, to allow spirits of wine to be used duty free for certain purposes, and government cast about for the most nauseous and offensive thing they could find to mix with the spirits of wine, so as to render it unfit for human consumption. They selected naphtha, because, once mixed with the spirits of wine they are incapable of purification by any process of rectification or otherwise. This mixture is more inflammable than gunpowder, and, once inflamed, it is next to impossible to put it out.

In the case of *Regina v. Watson*, of the house likely to fall, there was, no doubt, a certain amount of danger in the building as it stood, but in such a case it is generally some immediately acting cause that brings the building down; it is sufficient if a house is in such a state that in the course of the ordinary events of human life it is likely to fall, but not if only some extraordinary accident would bring it down. *Rex v. Taylor* is not the only authority to show that keeping gunpowder near a town is a nuisance. In 1 *Russ. on Crimes*, 321, it is said, "it seems that

1857.

 LISTER'S
 Case.

erecting gunpowder mills or keeping gunpowder magazines near a town is a nuisance by the common law, for which an indictment or information will lie." And for this is cited not only *Rex v. Taylor*, but also a case of *Rex v. Williams*, in which there was an indictment for keeping 400 barrels of gunpowder near the town of *Bradford*, and the defendant was convicted.

The ground on which these decisions rest is the great danger which arises from the very nature of the article kept, whatever care may be taken; and so if a person makes a hole near the highway into which the passers by might tumble, he would be indictable on account of the danger, although no one might be actually injured.

The definition of a nuisance in 1 *Hawk. P. C.* 692, is "an offence against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires." That definition is certainly sufficiently wide to include the present case.

It is, no doubt, difficult to describe the kind and degree of danger by ordinary adverbs, as "highly," "very," "most;" but we may safely say that it is sufficient if the danger is so great as to render it necessary that extraordinary caution must be used, and that, notwithstanding its use, danger may still arise by the ordinary accidents of life.

In *Rex v. Davey and Another* (a) *Heath J.*, in summing up, said, that to constitute a nuisance it must appear that the grievance was either destructive to the general health of the inhabitants, or rendered their dwellings uncomfortable or untenable. And Lord *Mansfield*, in *Rex v. White and Ward* (b), says, "it is

(a) 5 Esp. 218.

(b) 1 Burr. 337.

not necessary that the smell should be unwholesome it is enough if it renders the enjoyment of life and property uncomfortable." Now no dwelling can be comfortable which is near to a place where an article is kept which is so highly inflammable, and stored in quantities so large, as to keep the neighbourhood in continual fear; and, as to the necessary amount of danger, it may safely be said to exist when a thing is so dangerous that no amount of care could render it safe.

1857.

 LISTER'S
Case.

COLERIDGE J.—Suppose the greatest amount of care is taken by the owner, and a stranger comes in with a hot poker?

Wilde Q. C. Or if only a trifling fire occurred in a neighbouring house, the whole neighbourhood must be involved in a common and inevitable calamity.

WILLIAMS J.—In *Regina v. Watson* the danger to the public is treated as the essence of the offence—then the question arises as to the amount of danger.

Wilde Q. C. I contend that a thing is dangerous so as to be a nuisance, when no amount of caution or care can render it reasonably safe.

Applying that principle to the facts of this case, it is found, that if the contents of the warehouse did ignite, it would produce a fire which could not, in all human probability, be put out by any known means, and that, taking it for granted that the greatest possible precaution is used, such an event may occur by the commonest accident.

ALDERSON B.—Would it not be a nuisance to keep a house in such a state that if a candle is taken into it the destruction of the entire neighbourhood would be inevitable?

Wilde Q. C. Here the quantity of inflammable matter kept is 40,000 or 50,000 gallons, and no

1857.

 LISTER'S
Case.

amount of care, no human foresight, can prevent it from being dangerous.

Parry, in reply. If the arguments on the other side were addressed to the Legislature, they might not be without weight, but they cannot be maintained as legal propositions.

The case of the hole is not analogous, because there is danger in the very nature of the thing; and so in the tumble-down house; but here it is admitted that the thing is so kept that danger is prevented. To make the case of the hole analogous, it should be a hole covered with a trap door or grating, so that no one could fall in; for this is a case in which the dangerous thing is, as it were, hermetically sealed against accident. It is as if a man were indicted for working a mine because there would be danger if a man should take a candle instead of a *Davy* lamp into it.

There is a provision by stat. 9 & 10 *Wm.* 3. c. 7. s. 1., against making or using fireworks, and if that had been considered a nuisance at common law, an Act of Parliament would not have been necessary.

POLLOCK C. B.—Should not an indictment allege, not only the keeping of a dangerous thing, but the keeping of it in such a manner as to endanger the public? Every rectifier in the metropolis has thousands of gallons of spirits on his premises.

Parry. This indictment is in restraint of trade, and is founded on a pure imagination of what may possibly happen.

Cur. adv. vult.

This case was re-argued on 11th *May*, 1857, before Lord CAMPBELL C. J., COCKBURN C. J., POLLOCK C. B., COLERIDGE J., CRESSWELL J., ERLE J., CROMP-

TON J., CROWDER J., WILLES J., BRAMWELL B., 1857.
 WATSON B. and CHANNELL B.

LISTER'S
 Case.

James Wilde Q. C. (*Locke* with him) appeared for the Crown, and *Parry Serjt.*, for the defendants.

Parry Serjt., for the defendants. The defendants were found not guilty on the second and third counts of the indictment, and guilty on the first count only.

POLLOCK C. B.—That count does not mention spirits of wine.

Parry Serjt. No. I contend that count does not contain a statement of any offence at common law.

LORD CAMPBELL C. J.—There is evidence of depositing and keeping, but you say not conclusive evidence of danger. It would be difficult to say there was not evidence of an offence at common law.

COLERIDGE J.—There was evidence of liability to danger *ab extra*, but not of danger from within, on account of the manner in which the business was carried on.

POLLOCK C. B.—The first count only mentions the keeping of wood naptha, and the evidence is said to show that it was used so as to cause danger. To prove this, they give evidence that it was mixed with spirits of wine, but that is not charged in the indictment.

Parry Serjt. I submit that no fear of danger *ab extra* renders it indictable. Danger *ab extra* is like a prohibition *quia timet*, which the case, 3 *Atkyns*, 750, shows will not lie.

LORD CAMPBELL C. J.—If the question is merely whether evidence of danger *ab extra* is to be entirely disregarded, I think there is no difficulty in giving an opinion.

Parry Serjt. The first count, on which alone a verdict of guilty was returned, discloses no offence at common law.

1857.

LISTER'S
Case.

Lord CAMPBELL C. J.—You say it would be bad in arrest of judgment?

Parry Serjt. Yes. The case of *Rex v. Taylor* (a) is the only authority that the mere keeping of gunpowder is indictable; and it may well be that the keeping in that case was in such a manner as to cause danger. There are many articles besides wood naphtha which are inflammable.

Lord CAMPBELL C. J.—Wine is inflammable. I hope a man is not indictable for keeping a good cellar of wine; but it would surely be indictable to keep twenty tons of gunpowder in *Cheapside*.

James Wilde Q. C., for the Crown. The case states that wood naphtha is more inflammable even than gunpowder itself, and that, if inflamed, water could not put out the fire arising from it, unless applied in enormous proportions; and Drs. *Taylor* and *Letheby* were of opinion, *and as to this there was no dispute*, that, practically, a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighbourhood. That is the statement which is relied upon by the prosecution; and, it cannot be said that the storing an article of this description, so inflammable as scarcely to be quenchable by water, and which, if it did take fire, would produce a result little, if at all, short of the great fire of *London*, in a close and populous neighbourhood, is not a nuisance.

Since the decisions in *Rex v. Taylor* and *Rex v. Williams*, the 12 Geo. 3. c. 61. has prohibited the making or keeping a large quantity of gunpowder at one time or in one place under heavy penalties; but this statute does not in any way affect the common law.

(a) 2 Strange, 1167.

It is said that there is no allegation or proof that the warehousing in this case is carried on in such a manner as to render it dangerous; but the indictment charges that the naptha was deposited in "large and excessive quantities," and it is in the excessive quantity that the danger lies.

1857.

 LISTER'S
Case.

It is said that this is in the nature of a prohibition *quia timet*, as nothing has actually happened. The decisions show that the danger may be *ab extra*. The gist of the offence is the danger to the public. In *Rex v. Watson* the ruinous house near the highway, if left to itself, might never tumble down; but it might be caused to fall by the wheels of a carriage passing near it.

What Lord *Hardwicke* means by saying that the fears of mankind, though reasonable, will not create a nuisance, is, that they will not do so where the thing causing the fears would not, apart from them, be a nuisance at common law. It was the fear of infection from the small pox which rendered the person who carried the child along the highway indictable. The case in *Atkyns* is cited in *Rex v. Vantandillo* (a): in which it was held indictable to carry a child infected with the small pox along a public highway; and a similar decision was given in *Rex v. Burnett* (b). The learned counsel also referred to *Rex v. Brookes* (c) and *Rex v. Cole* (d).

ERLE J.—There is no case to show that it is indictable to keep any commodity except gunpowder?

Wilde Q. C. No; but the same principle applies to such an article as this.

ERLE J.—I have a right to keep a ruinous house in a field, but not near the highway. I have no right to keep a sword suspended over the heads of passengers.

(a) 4 M. & S. 75.

(c) Tremaine P. C. 195.

(b) Ibid. 272.

(d) Ibid. 198.

1857.

 LISTER'S
Case.

Wilde Q. C. The danger here both to passengers and to the inhabitants of the surrounding houses is imminent; the fact, that such extraordinary care as that disclosed by the case is required, proves the danger.

If you once establish that if a fire, however slight, should occur, the consequences are so fearful and so extensive as is admitted in this case, you have a danger amply sufficient. That the danger is such that the inhabitants are in such a state of fear as to render the habitations uncomfortable or untenable by reason of a well founded alarm, would be a fair definition.

The evil may be measured either by the liability of the thing to take fire, or by the consequence if it did take fire; once show that such a fire would not be under the control of mankind, and you have all that the law requires, for it is not lawful on general principles to have in a populous neighbourhood a thing which may produce consequences so disastrous.

WILLES J. referred to *Crowder v. Tinkler* (a), where, on an application for an injunction to restrain the defendant from using certain buildings for the purpose of making or storing gunpowder, Lord *Eldon* said (b): "The complaint is, therefore, to be considered as of, not a public nuisance simply, but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence; and on such a case, clearly established, I do not hesitate to say an injunction would be granted." His Lordship also referred to *Soltau v. De Held* (c), in which a defendant was restrained from ringing bells, so far as they occasioned an annoyance to the plaintiff or his family.

(a) 19 Ves. 617.

(b) Ibid. 622.

(c) 21 Law Jour. Chan. 153.

Wilde Q. C. There is also the case of *Williams v. The East India Company* (a), in which Lord *Ellenborough* says (b), "That the declaration, in imputing to the defendants the having wrongfully put on board a ship, without notice to those concerned in the management of the ship, an article of a highly dangerous combustible nature, imputes to the defendants a criminal negligence, cannot well be questioned. In order to making the putting on board wrongful, the defendants must be cognizant of the dangerous quality of the article put on board, and if, being so, they yet give no notice, considering the probable danger thereby occasioned to the lives of those on board, it amounts to a species of delinquency in the persons concerned in so putting such dangerous articles on board, for which they are criminally liable and punishable for a misdemeanor at least."

1857.

 LISTER'S
Case.

If it would be a criminal act thus to store an article of a highly combustible nature in a ship where there are but a few of the Queen's subjects, *à fortiori* must it be criminal to keep large and excessive quantities of an article, which is found to be more dangerous than even gunpowder, in premises in a densely populated neighbourhood, and surrounded by property of immense value, as in the present case.

Parry Serjt., in reply. This is an attempt to create a new offence, which would put an end to half the trade of *London*. In almost any business it may be said, if so and so takes place danger will result. Muslin is highly inflammable.

Lord CAMPBELL C. J.—Water would quench it.

Parry Serjt. So it would naphtha, if in sufficient quantity. It is not enough to show that something may happen. There is scarcely a portion of the City in which you do not pass large warehouses containing

(a) 3 East, 192.

(b) Ibid. 200.

1857. some combustible article, and the warehouses by our
LISTER'S great wharves are crowded with oil, turpentine, spirits
Case. of wine, and other inflammable materials.

Every attempt to find a decision in favour of the prosecution has failed except the gunpowder cases, and there must have been in those cases something more than a mere storing of the article. All principle is against this conviction, and if it is upheld, it will be fraught with the most pernicious consequences to the trade and commerce of this Metropolis.

Cur. adv. vult.

The judgment of the Court was delivered, on 30th May, 1857, by

Lord CAMPBELL C. J., who said: The judgment I am about to deliver has the unqualified approbation of all the Judges before whom this case was argued so far as relates to the point of law decided by it; but the Lord Chief Baron, for reasons which he has inscribed upon the judgment, and which I shall read at the end of the judgment, considers that the conviction ought not to be affirmed. His Lordship then read the following judgment. We are of opinion that this conviction ought to be affirmed. The defendants' counsel began by objecting to the first count of the indictment on which the conviction took place; but we do not entertain any doubt of its sufficiency. It alleges that the defendants "unlawfully, knowingly, and wilfully did deposit in a warehouse belonging to them near to divers streets and highways, and to divers dwelling-houses of her Majesty's subjects, divers large and excessive quantities of a dangerous, ignitable and explosive fluid, called wood naptha, and did keep in the said warehouse, and near to the said streets, highways and dwelling-houses, the said fluid in such large, excessive and dangerous quantities, whereby the

Queen's subjects passing along the said streets and highways, and residing in the said dwelling-houses, were in great danger of their lives and property, and were kept in great alarm and terror, *ad commune nocumentum*," &c. The indictment certainly does not state that any noxious effluvia issued from the naphtha, or that the air was corrupted by it, or that any bodily harm was done by it to any of the Queen's subjects; but we conceive that to deposit and keep such a substance in such quantities in a warehouse so situate, to the danger of the lives and property of the Queen's subjects, is an indictable offence. The law of the country would surely be very defective if life and property could be so exposed to danger by the act of another with impunity. There is no ground for saying that, according to the doctrine contended for by the prosecutor's counsel, neither brandy nor wine, nor oil, nor any ignitable substance, could be kept in the cellar of a town house without the owner of the house being liable to fine and imprisonment. The substance must be of such a nature, and kept in such large quantities, and under such local circumstances, as to create real danger to life and property. The well founded apprehension of danger which would alarm men of steady nerves and reasonable courage, passing through the street in which the house stands, or residing in adjoining houses, is enough to show that something has been done which the law ought to prevent by pronouncing it to be a misdemeanor. Accordingly, to manufacture, or to keep in large quantities, in towns or closely inhabited places, gunpowder (which for this purpose cannot be distinguished from naphtha) is by the common law of *England* a nuisance and an indictable offence. This doctrine is to be found in almost all our treatises on Crown law, and it was acted upon in *Rex v. Taylor*, 2 Strange, 1167; *Roger Williams's case*,

1857.

 LISTER'S
Case.

1857. 1 Russell, 321 ; and in *Crowder v. Tinkler*, 19 Ves. 617.

LISTER'S
Case.

We are next to consider whether the facts found by the jury in this case were sufficient to support the indictment. The jury found that "naptha is very inflammable, more so than spirits or even than gunpowder itself, passing into vapour at a heat of 140° of *Fahrenheit* ; and, if inflamed, water could not put out the fire arising from it, unless that water was applied in enormous proportions relatively to the quantity of inflamed naptha, and that without dispute a fire arising and communicating with the quantity kept upon these premises could not be quenched, and would produce very disastrous consequences to the neighbourhood." The jury, to be sure, likewise found that "it was the practice in the warehouse never to allow any candles or fire or gas-light to enter therein, and so long as that continued the naptha would not produce danger." These facts taken together would, we think, fully justify a verdict of guilty. Upon this statement, although no damage was actually done by the naptha, we cannot say that it might not have been dangerous to life and property irrespective of ignition *from without*. The supposed safety from within depended upon the care of the defendants' servants in not allowing any candles or fire or gas-light to enter the warehouse, and it was only so long as this care continued that the naptha could not produce danger. With great and unintermitting care gunpowder might be kept, and perhaps manufactured, in very large quantities without doing any damage ; but the law takes notice that occasional carelessness may be reckoned upon, and forbids that to be done which, on the recurrence of carelessness, will in all probability prove destructive to life and property. Therefore the simple keeping of large quantities of gunpowder in

the midst of a dense population was considered to be a misdemeanor at common law. The statute 12 *Geo.* 3. c. 61. does not create this offence, and only punishes with heavy penalties and forfeiture the breach of certain regulations which it enacts for the safe keeping and carrying of gunpowder.

1857.

 LISTER'S
Case.

We are called upon, however, by the question which the case submits to us, to say whether, when such a manufacture is carried on so carefully as in the opinion of scientific men to produce no danger, its liability to danger *ab extra* may make it a public nuisance. And we have no doubt that its liability to danger *ab extra* may make it a public nuisance. If the locality were in the midst of such terrific fires as blaze day and night in some coal and iron districts in this country, there might well be a danger of towns being laid in ashes by the explosion of a large accumulation of naphtha as well as of gunpowder, however carefully it might be kept by its owner in his warehouse. The naphtha stored in this warehouse in *Suffolk Lane, Thames Street*, in the heart of the city of *London*, might be seriously exposed to ignition from various external accidents. A fire might thus arise "which could not be quenched, and would produce very disastrous consequences in the neighbourhood." Upon the trial of such indictments we consider that it is a question of fact for the jury, whether the keeping and depositing, or the manufacturing of such substances, really does create danger to life and property as alleged—and this must be a question of degree, depending on the circumstances of each particular case. No general rule of law can be laid down beyond this, that the substantial allegations in the indictment must be substantially proved. In the present case we think that sufficient, although not necessarily conclusive, evidence was adduced, and that

1857.

LISTER'S
Case.

although the Judge would not have been justified in directing a verdict of guilty to be entered without taking the opinion of the jury upon it, he was fully justified in telling the jury (which he appears to have done) that if the depositing and keeping the naphtha in the manner described, coupled with its liability to ignition *ab extra*, created danger to life and property to the degree alleged, they might find a verdict of guilty. Whether the liability to ignition *ab extra* could properly be taken into consideration by the jury, he reserved for our opinion, and we answer—Yes. The conviction must therefore be affirmed.

This judgment having been submitted to the Lord Chief Baron, he writes these words :—“ *Dissentiente* the Chief Baron; not because he differs from the ruling of the rest of the Court in point of law, but because it appears to him that the defendants were indicted merely for *depositing the article in a warehouse*, and were convicted upon evidence of a dangerous *use* of it, in mixing it with another article to make a very combustible material; and he thinks there ought to be no judgment against the defendants on this trial, but that another indictment ought to be preferred.”

Lord CAMPBELL C. J., after reading the above judgment, said. I may observe, on my own part, in answer to the observations of the Chief Baron, that we only took into our consideration the danger arising from the manner of depositing and keeping the article by the defendants, and not the dangerous use of it in the mode of carrying on their business.

Conviction affirmed.

auth 13

REGINA v. WILLIAM KAY.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by BRAMWELL B.

The prisoner was tried before me at the last Assizes at *Ruthin*, on an indictment which charged him with stealing a post letter and a watch, laid to be the property of the Postmaster General, and in another count of *Thomas Jones*. *Thomas Jones* had bought a watch in *London*, which, requiring some regulating, he had sent to the seller. A letter was written by some person in his name, and without his authority, requesting the seller to return the watch to him, *Thomas Jones*, in a letter directed to the care of the postmaster at *Brymbo*. After this letter had been written, the prisoner and a person who falsely represented himself to be *Thomas Jones* came to the *Brymbo* post-office and asked for the watch. It had not arrived, and the man personating *Thomas Jones* requested that, when it did, it might be delivered to the prisoner. This was accordingly done by a clerk at the post-office at the prisoner's request next day, on the arrival of the watch. It must be taken that the writing of the letter, the personating of *Thomas Jones* and application for the watch, were parts of the same scheme, and that the watch was sent to *Brymbo* by the seller in pursuance of the fraudulent letter.

The prisoner was convicted of larceny from *T. J.* It appeared that *T. J.*, the owner of a watch, sent it, to be regulated, to *A.* (the person from whom he had bought it), who had no authority to deliver it to any one except the owner. The prisoner fraudulently induced *A.* to believe that *T. J.* desired that the watch should be sent by post to the postmaster at *B.* in a letter; and, the watch having been so sent, the prisoner personated *T. J.* and induced the postmaster to deliver it to him as *T. J.* Held, that on the receipt of the watch by

the postmaster the special property of *A.* ceased, and the general property of the owner becoming unincumbered drew to it the possession; that the postmaster, for the purpose of delivering the watch to the owner, was his servant, and the postmaster's possession being the possession of the true owner, that the prisoner was rightly convicted of larceny from *T. J.*

1857.

KAY'S
Case.

On this and other evidence the prisoner was convicted. But it having been objected that, if any offence had been committed, it was not stealing, but obtaining goods under false pretences, I, entertaining doubts thereon, discharged the prisoner on bail, and reserved the question for the opinion of the Court of Criminal Appeal.

G. BRAMWELL.

This case was argued on 2nd *May*, 1857, before COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

McIntyre appeared for the prisoner; no counsel appeared for the Crown.

McIntyre, for the prisoner. In support of the objection to this conviction, I submit that the offence committed, if any, was obtaining the watch by false pretences. The owner of the watch had placed it in the hands of the seller, who thereupon became the bailee, and the prisoner obtained the watch from the bailee by a false pretence of right, and there is therefore no larceny. The first count, charging the letter and watch as belonging to the Postmaster General, cannot be supported, for the postmaster parted not only with the possession, but also with all property in the letter. It was in fact sent to the prisoner, and it was the duty of the postmaster to deliver it, and for that purpose the postmaster was the agent of the false *Thomas Jones*. The letter was rightfully received from the postmaster, and therefore the subsequent appropriation would not be larceny. The case of *Rex v. Mucklow* (*a*) shows that where a letter is delivered by a postmaster to a party by mistake, and he afterwards appropriates the contents to his own use, it

(a) 1 Moo. C. C. 160.

is not larceny if he was guilty of no fraud in causing them to be delivered to himself. Now here there was no false statement made to the postmaster, and he voluntarily parted with the letter. The case of *Rex v. Mucklow* was afterwards acted upon in *Regina v. Davies (a)*.

1857.

 KAY'S
Case.

COLERIDGE J.—The seller intended to send the watch not to the prisoner, but to the true *Thomas Jones*, and the prisoner represented himself as the true *Thomas Jones*.

McIntyre. Then the offence was false pretences and not larceny. In *Regina v. Adams (b)* the prisoner went to the shop of the prosecutor, and falsely said he had come from *C.* for some hams, and at the same time produced a forged note purporting to be written by *C.*, and desiring the prosecutor to send some hams by the bearer, and the prosecutor accordingly delivered the hams to the prisoner, and it was held not to be larceny. That case was decided on the authority of *Atkinson's case (c)*.

COLERIDGE J.—Whom do you call the *dominus* of the watch, because here it was *invito domino*?

McIntyre. The seller in *London*. The indictment does not charge a larceny from the seller, and, if it had, it could not have been supported. The case of *Regina v. Thistle (d)* shows that if the watchmaker (the seller) had appropriated the watch himself, he would not have been guilty of larceny; therefore his wrongfully parting with it to another person could not make that person guilty of a larceny from the true owner; and as to the count charging it to be the property of the Postmaster General, the postmaster was in fact the servant of *Myers* (the seller), and it is as if the watch had been obtained direct from the

(a) Dears. C. C. 640.

(b) 1 Den. C. C. 33.

(c) 2 Russ. on Cri. 35.

(d) 1 Den. C. C. 502.

1857.

KAY'S
Case.

seller, who, for the purposes of this case, must be taken to be the real owner of the watch.

BRAMWELL B.—There is a count charging the property as in the real *Thomas Jones*. Was not the property in him?

McIntyre. I say not, but in the seller, to whom he had entrusted it; the representation to the postmaster was the same as if made to the seller, and therefore it is a case of false pretences, and not of larceny.

BRAMWELL B.—If the seller did what he ought not to have done, did he not thereby determine his bailment, and did not the property thereby become vested in the true owner?

McIntyre. If so, still it would not be larceny, but false pretences.

COCKBURN C. J.—The watchmaker intended that the watch should be delivered to the true *Thomas Jones*.

McIntyre. He intended to part with the watch to the man who wrote the letter, believing him to be the true *Thomas Jones*.

WILLES J.—Would the prisoner be liable to the prosecutor in trespass? Every larceny supposes a trespass, and the law in both cases is founded on the same principles.

McIntyre. I think not. The watch was not taken *invito domino*, but was voluntarily parted with by a person who had a special property in it.

Cur. adv. vult.

The judgment of the Court was delivered, on 11th May 1857, by

COLERIDGE J.—We are of opinion that the prisoner in this case was rightly convicted of felony.

Thomas Jones, the owner of a watch, had placed it

with the seller for a specific purpose, the regulating it; and as it is not stated that he had given any specific directions when or how it was to be returned, it must be taken that the seller had no authority to deliver it to any one but *Thomas Jones*, or some one commissioned by him to receive it. By the fraud of the prisoner he is induced to believe that *Thomas Jones* had desired him to send it by post to the postmaster at *Brymbo*, inclosed in a letter addressed to *Thomas Jones*. The postmaster, also induced by the fraud of the prisoner, delivers the watch to him, believing him to be *Thomas Jones* or his agent, and thus the possession is obtained. Now, assuming it to have been correctly contended in the argument that the seller of the watch had more than a bare charge, and was the bailee of it, yet his special property as such did not put an end to the general property of the true owner; and, when he sent the watch away to a third person, addressed to the true owner, intending such third person to deliver it to the true owner, and that third person, the postmaster, received it for that purpose, the seller's possession and right of possession and special property all ceased, the general property of the true owner became entirely unincumbered, and drew to it the possession, unless the postmaster himself became the bailee, as the seller had been before. But this he did not, according to *Pearce's case* (a), where the prisoner, pretending to be the mail guard, obtained from the postmaster the bags of letters, and was held to have been rightly convicted of stealing letters out of the Post Office, the postmaster having no property in them, but only a charge.

Although the prisoner had, by fraud, induced the

 1857.

 KAY'S
Case.

(a) 2 East, P. C. 603 and 673.

1857.

KAY'S
Case.

seller to part with his special property, assuming that he had such, yet no possession had thereby in fact vested in him; and when the possession in fact had come to the postmaster, it would be unreasonable to hold that the prisoner, by calling himself *Thomas Jones*, and falsely pretending to be the true owner, had made the postmaster his servant and agent, or the postmaster's actual possession his; since the postmaster had received it for the true owner, and intended to deliver it to the true owner. The postmaster being the servant of the true owner for this purpose, his possession was the possession of the true owner, and could not be divested by the tortious taking from him, according to *Wilkins's case* (a). On this ground the prisoner's offence appears to us to have been clearly larceny.

Conviction affirmed.

(a) 2 East, P. C. 673, 4.

1857.

REGINA v. JOHN EVANS.

The prisoner was convicted, on an indictment under section

57 of 9 & 10 *Vict. c. 95.*, for acting and professing to act under a false colour and pretence of the process of the County Court. It appeared that the prisoner, being a creditor of R., sent him a letter not in any way resembling County Court process, but headed with the royal arms and purporting to be signed by the clerk of a County Court, threatening County Court proceedings. He afterwards told the wife of R. that he had ordered the County Court to send the letter, upon which she paid the debt; and, whilst the prisoner was writing out a receipt, he demanded of her a sum of money for County Court expences.

Held, by Lord CAMPBELL C. J., ERLE J., WILLIAMS J. and CROWDER J., that these facts constituted an acting and professing to act under the false colour or pretence of the process of the County Court within the meaning of the section; and that the conviction was right.

Held, by BRAMWELL B., that that portion of the section upon which the indictment was framed referred to false pretences whilst acting under genuine process, and that the conviction was wrong.

Appeal by the Chairman of the Quarter Sessions for the county of *Montgomery*.

1857.

 EVANS'S
Case.

The prisoner was tried before me and others of her Majesty's justices of the peace for the County of *Montgomery*, at the General Quarter Sessions of the Peace for the said county, holden at *Welchpool*, on the 10th day of *January* last, upon a charge of having acted and professed to act under a false colour and pretence of the process of the County Court of *Montgomeryshire*, holden at *Welchpool*.

The following is a copy of the indictment.

"*Montgomeryshire* to wit. The jurors for our lady the Queen upon their oath present that *John Evans* late of the parish of *Llanfair* in the county of *Montgomery* joiner on the 23rd day of *October* in the year of our Lord one thousand eight hundred and fifty six acted and professed to act under a false colour and pretence of the process of the County Court of *Montgomeryshire* holden at *Welchpool* in the manner and by the ways and means hereinafter mentioned that is to say. For that one *John Roberts* being at the time of the committal of the offence hereinbefore alleged indebted to the said *John Evans* in a certain sum of money, the said *John Evans*, in order to obtain the payment of the said money, did send to the said *John Roberts* a letter or application demanding payment of the money so due to him the said *John Evans* from the said *John Roberts* as aforesaid and which letter or application was in the words or to the effect following that is to say '*Welchpool Oct. 17th 1856. [V (Royal Arms) R] To Mr. John Roberts. Sir. I hereby give you notice that unless the amount of your account £0. 10s. 0d. which is due to me is paid on or before the 23rd instant to me at the Quarry proceedings will be taken to obtain the same in pursuance with the provisions of the statute 9th & 10th of*

1857. *Victoria* cap. 25th of the new County Court Act for
EVANS'S the more easy recovery of small debts &c. Yours &c.
Case. *Frederick Mugliston* clerk to Court instructed by
John Evans.' And for that the said *John Evans* after
the sending of the said letter to the said *John Roberts*
as aforesaid to wit on the said 23rd day of *October* in
the year of our Lord one thousand eight hundred and
fifty six did under the colour or pretence that the said
letter was the process of the said County Court of
Montgomeryshire holden at *Welchpool* and that the
same authorized him so to do demand from *Mary*
Roberts the wife of the said *John Roberts* payment to
him the said *John Evans* of certain money which he
the said *John Evans* then alleged to be due from the
said *John Roberts* as the Court fees upon the said
letter or application and did then thereby and by
other means act and profess to act under colour or
pretence of the process of the said County Court of
Montgomeryshire holden at *Welchpool*; whereas in truth
and in fact the said letter or application so sent to the
said *John Roberts* as aforesaid was not the process of
the said County Court of *Montgomeryshire* holden at
Welchpool and was not issued by the registrar of the
said County Court or by any other person having
authority to issue the process thereof which the said
John Evans then well knew. And whereas in truth and
in fact the said *John Evans* had then no authority to
act or profess to act under any process of the said
County Court of *Montgomeryshire* holden at *Welch-*
pool or to demand or take from the said *Mary Roberts*
payment of any sum or sums of money under colour
or pretence of any process of the said County Court
of *Montgomeryshire* holden at *Welchpool* which the said
John Evans then well knew. Against the form of the
statute in such case made and provided and against the
peace of our lady the Queen her Crown and dignity." - -

It was proved on the trial, that one *John Roberts*, who resided at *Llanfair*, within the district of the County Court for *Montgomeryshire*, holden at *Welchpool*, was indebted to the prisoner in the sum of ten shillings, and that the prisoner, for the purpose of obtaining payment of such debt, sent to the said *John Roberts* the letter set out in the indictment. The original letter is annexed to, and is to form part of this case, and is marked "A." (a).

1857.

 EVANS'S
Case.

A genuine form of summons of the County Court of *Montgomeryshire*, holden at *Welchpool*, is also annexed to, and is to form part of this case, and is marked "B."

Some days after the said letter had been received *Mary Roberts*, the wife of the said *John Roberts*, went to the prisoner at *Llanfair*, and asked him if he had sent the letter, to which the prisoner replied that he had ordered the Court to send it, and upon being so informed, she paid the prisoner the ten shillings, the money demanded in the letter.

Whilst the ten shillings were lying on the table, and whilst the prisoner was writing the receipt, the prisoner asked *Mary Roberts* for "fifteen pence for the County Court expenses, as he wanted to put the full amount in the receipt." *Mary Roberts* said she had no more money. The prisoner then said he would take sixpence, and that he had done the same with *Mr. Evans* of *Hirrhos*, who had paid him fifteen pence for County Court expenses. *Mary Roberts* still said she had not any more money, and no money was paid by *Mary Roberts* for costs, and a receipt for the ten shillings alone was given. A copy of such receipt is annexed to, and is to form part of this case, and is marked "C."

(a) This and the other documents referred to will be found at the end of the case.

1857.

EVANS'S
Case.

The jury convicted the prisoner, and I sentenced him to imprisonment with hard labour for two calendar months, but respited the execution of the sentence, admitting the prisoner to bail, until the *Midsummer* Sessions, in order to obtain the opinion of the Court for Criminal Cases Reserved upon the question whether the facts, as above stated, constitute an offence within the meaning of the 57th section of the County Courts Act, 9th & 10th *Vict.* cap. 95.

Powis,

Chairman.

The following are copies of the documents referred to in the case.

A.

Welchpool, October 17th, 1856.To Mr. *John Roberts*,

Sir,

I hereby give you notice that unless the amount of your account £0. 10s. 0d., *which is due to me*, is paid on or before *the 23rd instant to me at the Quarry*, proceedings will be taken to obtain the same in pursuance with the provisions of the statute 9th and 10th of *Victoria*, cap 25th of the New County Court Act for the more easy recovery of small debts, &c.

Yours, &c.,

*Frederick Mugliston, Clerk to Court,**Instructed by John Evans (a).*

(a) The words and figures in italic were in writing; the rest was a printed form.

B.

1857.

EVANS'S
Case.5. *Summons to appear to a Plaintiff.*

No. of Plaintiff.....

In the County Court of *Montgomeryshire* holden at *Welchpool*.

Between

Plaintiff

and

Defendant

You are hereby summoned to appear at
a County Court to be holden at *Welchpool*
on the day of 185
at the hour of in the noon
to answer the plaintiff to a claim the par-
ticulars of which are hereunto annexed.

	£	s.	d.
Debt or claim			
Costs of Plaintiff			
Attorney's costs			
Total amount	£		

Dated this

day of

185 .

To the defendant.

Robert D. Harrison,

Registrar of the Court.

N. B. If you owe the money and will consent to a judg-
ment you will save half the hearing fee.

N. B. See notice at the back (a).

C.

Received of *W. Roberts* the sum of 10s., being due for coffin
for a child.

Oct. 22nd, 1856.

John Evans.

(a) It is not considered necessary
to insert the notice indorsed, which
was the usual notice at the back of
a County Court Summons, as to the
way in which expence might be
saved by confessing the claim, or

by paying debt and costs before
the hearing, as to notice to be
given of particular defences and as
to the power of the defendant to
have a jury, &c.

1857.

 EVANS'S
Case.

This case was argued on 30th *May*, 1857, before Lord CAMPBELL C. J., ERLE J., WILLIAMS J., CROWDER J. and BRAMWELL B.

Welsby appeared for the Crown, and *McIntyre* for the prisoner.

M'Intyre, for the prisoner. Section 57 of the 9 & 10 *Vict.* c. 95., on which this indictment is said to be framed, after providing that summonses and process shall be sealed or stamped with the seal of the Court, enacts that "every person who shall forge the seal or any process of the Court, or who shall serve or enforce any such forged process, knowing the same to be forged, or deliver or cause to be delivered to any person any paper falsely purporting to be a copy of any summons or other process of the said Court, knowing the same to be false, or who shall act or profess to act under any false colour or pretence of the process of the said Court, shall be guilty of felony." I contend that the prisoner has committed no offence within the meaning of this section. There was no acting or professing to act under a false colour or pretence of process. The letter did not purport to be a copy of any summons or other process of the Court; nor was it pretended that any process in fact existed.

Lord CAMPBELL C. J.—The letter, *per se*, does not purport to be process.

M'Intyre. There is nothing in it like process.

WILLIAMS J.—It is a sort of *Welch* attorney's letter.

M'Intyre. To bring the case within the meaning of the section there must either be an acting under genuine process by a false colour or pretence, or there must be something amounting to an imitation of process; here there is no genuine process, and the letter in no way resembles a summons or other process of the Court.

Lord CAMPBELL C. J.—It seems to be conceded that merely sending the letter was not acting under colour of process.

1857.

 EVANS'S
Case.

M^rIntyre. And I contend that the subsequent demand of expences by the prisoner does not satisfy the statute. The ten shillings was all that was demanded in the letter; when she had paid him that sum, and had thereby satisfied the demand contained in the letter, and whilst the prisoner was writing out the receipt, he asked her for 15*d*. It is true he said “for County Court expenses,” but he did not refer to the letter, or to any alleged process of the Court, and therefore he could not be said to be acting under any false colour or pretence of the process of the Court. The learned counsel referred to *Regina v. Myott* (a).

BRAMWELL B.—I am inclined to think that the section is directed against the forgery of process, or falsely acting under genuine process. This letter merely contains a ridiculous story which a person is so foolish as to believe.

CROWDER J.—There are the Royal arms and *V. R.* printed at the head of the letter. It is true there is nothing of that kind upon a genuine summons; but they are put upon the letter for the purpose of inducing the belief that it comes from the Court, and then the prisoner afterwards demands money for County Court expenses.

Lord CAMPBELL C. J.—As I said before, I think the letter, *per se*, would not be a pretence of process within the meaning of the act; but the Royal arms and the *V. R.* being upon it, and its being followed up by a demand of County Court expenses, would seem to make out that the prisoner did profess to act

1857. under the process of the Court. Suppose there had been no letter, and money had been demanded for County Court expenses, the defendant saying "I have sued out a summons, and so much is due for expenses," would not that be acting under pretence of the process of the Court?

EVANS'S
Case.

M'Intyre. That would be a false pretence, and punishable as such. It was not intended by this statute to make that which was simply a false pretence a felony. The section applies, 1. To forging the seal or the process of the Court, or serving any such forged process: 2. To uttering any paper falsely purporting to be a copy of process: and 3. To acting under any false colour or pretence of the process (*i. e.* the genuine process) of the Court.

Welsby, for the Crown. This is a question of much importance, as frauds of this kind have become frequent, and are generally practised upon a class of persons who can neither read nor write, and are readily deceived even by a letter like that sent by the prisoner. The question is, what is the proper construction of the statute? The section begins by providing against forging the seal or other process of the Court, or serving any such forged process; then it proceeds another step, and deals with those who shall deliver any paper falsely purporting to be a copy of any process; then comes the provision, "or who shall act or profess to act under any false colour or pretence" (verbal or written) "of the process of the said Court." That does not mean acting under false colour of genuine process, but acting under the false colour or pretence that there is process.

In order to see whether the prisoner did so act we must look at the entire proceeding: first, he sends this letter bearing the Royal arms and purporting to be signed by "Clerk to Court," and then he says to the

woman, after she has paid the debt, I want fifteen pence more. For what? For County Court expenses. It cannot be said that he was not then acting under colour or pretence of the process of the Court; nor can it be doubted that this is the very fraud against which the statute intended to provide.

M'Intyre replied.

1857.

EVANS'S
Case.

LORD CAMPBELL C. J.—With sincere respect for the opinion of my brother BRAMWELL, I should, except for the view which he has expressed, have thought this to be an exceedingly clear case. This section of the act is for the benefit of a class of persons who are illiterate and liable to be imposed upon, and is intended to protect them from false charges under colour or pretence of process. With that view the section first provides for the offence of forging the seal or process of the Court, or knowingly serving forged process; then it provides against delivering, or causing to be delivered, any paper falsely purporting to be a copy of any process of the Court; and then, with very sweeping words, it brings within the meaning of the enactment every person “who shall act or profess to act under any false colour or pretence of the process of the said Court.” Now this branch of the section appears to me to apply to a person pretending to act under process of the Court when there is in fact no process, and it therefore applies to the present case. The mere sending of the letter by the prisoner would not alone have been sufficient; but he afterwards pretended that fifteen pence was due for County Court expences, and, there can be no doubt, intended the woman to believe that he had process which entitled him to receive that sum; that he had incurred costs in respect of proceedings in the County Court. When asked whether he had sent the letter to the prosecutor he replied that he ordered the Court to send it; and

1857.
EVANS'S
Case.

if you look at the letter you find it purports to be issued by the Court at his instance. The letter having been sent, and the statement made by the prisoner that he ordered the Court to send it, he asks for the money for County Court expences. What does that mean but that, the Court having caused that letter to be sent, the sum of fifteen pence was due for the Court expences? It seems to me, I own, very clear that, although the prisoner received no money for costs, because, as the case states, *Mary Roberts*, after paying the ten shillings, said she had no more money, the prisoner did, in demanding the fifteen pence for Court expences, profess to act under the false colour and pretence of the process of the Court; and I think that this case is within both the words and the object of the act of Parliament.

ERLE J.—I also think that this conviction should be affirmed. The question is, whether the present case is within the 57th section of the County Courts Act; and I think it is. Those tribunals were created for the benefit of, and are calculated largely to affect, the poorer classes, and it was intended by this section to protect them from extortion. It applies, first, to persons who shall forge process or use pretended proceedings instead of real ones; secondly, to those who shall deliver anything falsely purporting to be a copy of process; and, lastly, we have this very wide provision, applying to every person “who shall act or profess to act under any false colour or pretence of the process of the Court.” Now, did this man pretend to act under the process of the Court? He sent a letter, intending that the person receiving it should think it was a document having some legal force, and he told the woman that he had ordered the Court to send that letter; and there is no doubt he meant the woman to believe that the letter came from the County Court.

If we were to construe the section as suggested by Mr. *M'Intyre*, we should render it nearly inoperative. The letter itself is no doubt a strange document; but we must take the sending of that letter in connection with the surrounding circumstances, and they clearly show that the prisoner intended the woman to believe that there was process of the Court, and that he was acting under it.

1857.

 EVANS'S
Case.

WILLIAMS J.—I am of the same opinion. The only argument of Mr. *M'Intyre* which appears to have affected the mind of the Court is, that the word “process,” in the latter part of the section, must be taken to mean “genuine process;” but I do not see why we should put such a construction upon it; nor is there, as it seems to me, anything in the section to warrant such a construction. I think the case is within the words of, and the mischief contemplated by, the statute, and that the conviction was right.

CROWDER J.—I am of the same opinion. I think it quite clear that this case falls within the latter part of the section. I think the Legislature intended by that branch of the section to meet the case where there is no forged process or pretended copy of process, but where there is a pretence of process under which money is demanded; and I think we should take a very narrow view of the statute if we adopted that which has been contended for by the learned counsel for the prisoner.

BRAMWELL B.—I am solitary in my opinion, and therefore I unfeignedly think I am wrong; but, following the words of the statute as I find them, I do not think they include this case. Before I heard the opinions expressed by the Court, it appeared to me that the section we are now considering was meant to prevent forgeries of process and false pretences under genuine process. The words are, “or who shall act

1857.

EVANS'S
Case.

or profess to act under any false colour or pretence of *the process of the Court*. The words are not "pretended process;" and they seem to me to imply an acting under a genuine document by a false colour or pretence. It is admitted that the prisoner would not have been liable to an indictment for forging the process of the Court. I agree with Mr. *M'Intyre* in supposing that the statute means that there must be a pretence of acting under some genuine process; but I do not find that the prisoner did say that there was any process at all under which he was acting. It seems to me that the conviction was wrong.

Conviction affirmed.

1857.

REGINA v. DAVID HUGHES.

The prisoner was convicted of manslaughter. It appeared that the deceased was with others employed in walling the inside of a shaft in a colliery. It was the duty of the prisoner to place a stage on the mouth of the shaft, and the death of the deceased was the direct consequence

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by WATSON B.

This prisoner was tried before me at the last *Swansea* Assizes on *February* 25th, 1857, on an indictment for manslaughter.

It was proved that some contractors were employed to wall the inside of a new shaft, which was sinking, in a colliery called the *Tylecock Colliery*. The deceased, with others, was working at the wall on a stage in the shaft. The prisoner was banksman at the top of the shaft, where there was an engine and rope to send down bricks and materials in a bucket,

of the negligent omission on the part of the prisoner to perform such duty. *Held*, that the conviction was right.

That which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence.

and draw up the empty buckets. It was his duty to send down materials, and to superintend the proper letting down of the buckets, and to place the stage hereinafter mentioned. The buckets were run on a truck on to a moveable stage over half the area of the top of the shaft, and there the bucket was attached and lowered down, the stage being withdrawn.

1857.

 HUGHES'S
Case.

The prisoner on the occasion in question had omitted to put or cause to be put the stage on the mouth of the shaft. In the absence of the stage a bucket with a truck and bricks ran along the tram-road into the shaft, and fell down the pit and killed the deceased. It did not appear that the prisoner was directing or driving the waggon at the time. I left it to the jury whether the accident happened by negligence of the prisoner, and whether that negligence arose from an act of commission or omission. They found that the death of deceased arose from negligent omission on the part of the prisoner in not putting the stage on the mouth of the shaft. Thereupon I directed a verdict of guilty. I did not pass sentence: I released the prisoner on bail until the opinion of the Court of Criminal Appeal should be taken.

W. H. WATSON,
May 23, 1857.

This case was considered on 30th *May*, 1857, by Lord CAMPBELL C. J., ERLE J., WILLIAMS J., CROWDER J. and BRAMWELL B.

No counsel appeared.

Cur. adv. vult.

The judgment of the Court was delivered on 18th *June*, 1857, by

Lord CAMPBELL C. J.—We are of opinion that this conviction ought to be affirmed. It was the

1857. duty of the prisoner to place the stage on the mouth

HUGHES'S of the shaft; the death of the deceased was the
Case. direct consequence of the omission of the prisoner to
perform this duty; if the prisoner, of malice afore-
thought and with the premeditated design of causing
the death of the deceased, had omitted to place the
stage on the mouth of the shaft, and the death of the
deceased had thereby been caused, the prisoner would
have been guilty of murder. According to the com-
mon law form of an indictment for murder by reason
of the omission of a duty, it was necessary that the
indictment should allege that it was the duty of the
prisoner to do the act, or to state facts from which the
law would infer this duty. *R. v. Edwards*, 8 Car.
& P. 611; *R. v. Sarah Goodwin*, 1 Russ. C. C. 563,
n., 3rd ed. But it has never been doubted that if
death is the direct consequence of the malicious omis-
sion of the performance of a duty (as of a mother to
nourish her infant child), this is a case of murder. If
the omission was not malicious, and arose from negli-
gence only, it is a case of manslaughter. It has been
held that to make the captain of a vessel guilty of
manslaughter in causing a person to be drowned by
running down a boat, proof of a mere omission on his
part to do the whole of his duty is not sufficient; *R.*
v. Allen, 7 Car. & P. 153. But there is no authority
for the position that without an act of commission
there can be no manslaughter; and, on the contrary,
the general doctrine seems well established, that what
constitutes murder, being by design and of malice
prepenze, constitutes manslaughter when arising from
culpable negligence.

Conviction affirmed.

3 Inst & Foul 838

REGINA v. SAMUEL SHERWOOD.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by WILLES J.

Samuel Sherwood was tried before me at the last *Stafford* Assizes for obtaining money under false pretences upon two occasions from *Phæbe Smith*. Each of the counts stated the pretence to be a false pretence as to the weight of a quantity of coals sold and delivered by him. It appeared in evidence as follows. The prisoner was a coal dealer. Upon the 24th *December*, 1856, *Phæbe Smith* asked him to sell her a load of coals which he then had. He declined, but said he would fetch and sell and deliver her one for seven pence per cwt. from a colliery where he was in the habit of buying, to which she assented, and he accordingly fetched and delivered to her a load actually to his knowledge weighing 14 cwt. He however represented to her that the weight of it was 18 cwt., and that it had been weighed out at the colliery, and he produced a ticket showing such to be the weight, which ticket he stated he had made out himself when it was weighed. *Phæbe Smith* thereupon paid him for the 18 cwt. Upon the 6th *February*, 1857, there was a similar transaction, except that the coals delivered weighed only a ton, and were represented by the prisoner to weigh 23 cwt. Upon each occasion the prisoner misrepresented the weight of the coals, wilfully and fraudulently, knowing them to be

The prisoner was convicted on an indictment charging him with obtaining money by false pretences; the alleged pretences being as to the weight of coals sold and delivered by the prisoner to the prosecutrix. It appeared in evidence that the prisoner having agreed with the prosecutrix to sell and deliver a load of coal at a certain price per cwt., did deliver a load of coal which he knew weighed 14 cwt. only; but he falsely and fraudulently pretended that the weight was 18 cwt. and that it had been weighed out at the colliery, and he produced a ticket

showing such to be the weight, which ticket he said he had made out himself when the coal was weighed; and the prosecutrix thereupon paid him for the 18 cwt. Held, that the conviction was right.

1857.

SHER-
WOOD'S
Case.

of the less weight, for the purpose of defrauding the buyer of the difference in price between the actual and represented weight; and he made the misrepresentation as to the weight of the coal, verbally and by the ticket, for the purpose of defrauding the buyer, and inducing her to pay more than the just price of the coals, and by such false pretences intending to obtain, and did obtain, the price of excess. The counsel for the prisoner contended that this case was not within the statute, inasmuch as it was the case of a misrepresentation as to the quantity and value of an article agreed to be sold, and which was actually sold and delivered to the purchaser, and that the statute does not apply to misrepresentations made upon sales. I was of the contrary opinion, and left the case to the jury, who convicted the prisoner. But being under the impression that doubt still existed upon the subject, notwithstanding the cases of *Burton*, 1 Dears. & Bell, 11, and *Roebuck*, Ibid. 24, I reserved the matter for the consideration of the Judges, postponed the judgment, and held the prisoner to bail. See also *Regina v. Eagleton*, Dears. C. C. 515.

J. WILLES.

This case was argued on 2nd *May*, 1857, before COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

McMahon appeared for the Crown, and *Rupert Kettle* for the prisoner.

Rupert Kettle, for the prisoner. The question is, whether a false pretence as to quantity is within the statute. Several recent decisions have been referred to by the learned Judge who reserved this case. The first in order of time is *Regina v. Eagleton (a)*. In that case it was left undecided whether a sale of goods with a false representation of the weight is an indict-

(a) Dears. C. C. 515.

able offence; and *Parke* B., in delivering the judgment, treats that as a question undecided, for he says (a), "If this had been the case of a sale of bread to the prosecutors with a false representation of the weight, and an attempt thereby to receive a larger price than was really due, we should have had to decide whether an indictable offence had been thereby committed." And his Lordship speaks of *Regina v. Abbott* (b) and *Regina v. Kenrick* (c), on the authority of which it was decided, as cases which would then have to be considered. *POLLOCK* C. B., in the same case (d), says, "I doubt much whether any real dealing about buying and selling is within the statute. If the buying and selling are merely a pretence in order to cheat, it is a different thing." In *Regina v. Burgon* (e), the pretence was, that a house had been erected on certain land proposed to be mortgaged. There the representation was *wholly* false, for in fact there was no house at all. The decision in that case was founded on *Regina v. Abbott* (f), and there, too, we find that the pretence was *wholly* false. The pretence was, that certain cheese produced in a taster was part of the bulk, when in fact it was not. It may be, that where one chattel is substituted for another it is within the statute, and the test may be, is the representation *wholly* false? Then, in *Regina v. Roebuck* (g), the prosecutor had not the thing he bargained for (a silver chain), and the representation was wholly false.

COLERIDGE J.—Is not the misrepresentation here as to the 4 cwt. wholly false?

R. Kettle. The representation was, that the coals weighed 18 cwt., when in fact they weighed only 14 cwt. That representation was not wholly false.

1857.

 SHER-
WOOD'S
Case.

(a) Dears. C. C. 535.

(b) 1 Den. C. C. 273.

(c) 5 Q. B. 49.

(d) Dears. C. C. 531.

(e) *Antè*, p. 11.

(f) 1 Den. C. C. 273.

(g) *Antè*, p. 24.

1857.

 SHER-
WOOD'S
Case.

Lord CAMPBELL, in his judgment in *Regina v. Roebuck* (a), says, that he should have had great difficulty in saying it would have been the subject of a criminal prosecution if the defendant had intended by his false representation not to steal the money, but only to get a better bargain, or to obtain an advantage to himself which he would not otherwise have obtained, the other party having an equivalent, although not of the full value which he was entitled to expect. But there is a case directly in point, *Rex v. Reed* (b), in which the prisoner had, as in this case, sold coals with a false representation of their weight. That case was tried before Tindal C. J., and the prisoner was convicted; but the prisoner's counsel having moved in arrest of judgment, the question whether the false pretence was within the statute was reserved, and in the ensuing term the case was considered by the Judges, who held the conviction wrong. It is true that Lord Denman, in *Hamilton v. Regina* (c), said that that decision never took place, and in consequence of that statement the decision in *Rex v. Reed* seems to have been ignored in subsequent cases; but it appears by a foot note to the case of *Regina v. Roebuck* in *Dearsly & Bell's Reports* (d), that the case of *Rex v. Reed* was in fact considered and decided by the Judges, and an extract from the records of the Home Circuit is given to show that it was so, and I am now entitled to use that case in my favour.

COLERIDGE J. (addressing *Carrington*) asked if he had ascertained whether the judgment in *Reed's case* was entered in the *Black Book*?

Carrington. I have not. The report was originally furnished to me by Mr. *Clarkson*, and in consequence of the observations made upon it, I made enquiries

(a) *Antè*, p. 38, 39.

(b) 7 Car. & P. 848.

(c) 9 Q. B. 279.

(d) *Antè*, p. 35.

of the clerk of arraigns on the *Home* Circuit, and found that the judgment had been given as reported.

COCKBURN C. J.—The case of *Rex v. Reed* seems to be immediately in point; and, as it seems to have been erroneously supposed not to have been decided when the recent cases were argued, I do not think that we, a Court consisting of five Judges, would be justified in overruling it. This case must therefore be argued before the fifteen Judges.

1857.

 SHER-
WOOD'S
Case.

The case was accordingly re-argued on 11th *May*, 1857, before LORD CAMPBELL C. J., COCKBURN C. J., POLLOCK C. B., COLERIDGE J., CRESSWELL J., ERLE J., CROMPTON J., CROWDER J., WILLES J., BRAMWELL B., WATSON B. and CHANNELL B.

Powell (in the absence of *Rupert Kettle*), for the prisoner. This case is not within section 53 of 7 & 8 *Geo.* 4. c. 29., which enacts, that “if any person shall by any false pretence obtain from any other person any chattel, money or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor.”

CRESSWELL J.—Read the preamble.

Powell. The recital is: “Whereas a failure of justice frequently arises from the subtle distinction between larceny and fraud.”

CRESSWELL J.—The words in the section seem to go much beyond the mischief apprehended as shown by the preamble.

Powell. *Rex v. Lara* (a) and *Rex v. Wheatley* (b) show that this would not have been an offence at common law, or under the statute 33 *Hen.* 8. c. 1. Shortly after the passing of 30 *Geo.* 2. c. 24., which was analogous to the statute now under consideration, it was decided, in the case of *Rex v. Osborn* (c), that

(a) 6 T. R. 565.

(b) 2 Barr. 1125.

(c) 3 Barr. 1697.

1857.

 SHER-
WOOD'S
Case.

an indictment did not lie at common law for fraudulently selling coals of short weight; and *Ashley J.* suggested that such frauds deserved the attention of the Legislature, thereby showing that the Judges did not think the case was within the then existing statutes. In *Rex v. Bower (a)*, which was also decided after the passing of 30 *Geo. 2. c. 24.*, it was held that fraudulently selling corrupt gold, under the sterling alloy, for gold of the pure standard, was "not indictable" in an ordinary person; which would seem to show that such a case was not deemed to be indictable either at common law or under that statute. It is only since *Regina v. Kenrick (b)* that such cases have been considered indictable, and the dicta in that case being clearly extrajudicial, cannot be considered as a binding authority, nor can the cases be considered binding which have been decided upon it. In *Rex v. Codrington (c)*, which case I contend is still law, *Littledale J.* says, that a doctrine like that which is now contended for by the prosecution would make every breach of warranty or false assertion during a bargain a transportable offence. The case of *Rex v. Reed (d)*, which is now admitted to have been decided by the twelve Judges, is precisely in point.

LORD CAMPBELL C. J.—There is now no doubt that case was decided. The record is set out in the note to *Dearsly & Bell's Reports*. That is an authority in your favour.

Powell. The decision in that case is at variance with the modern decisions, which are founded on the dicta in *Regina v. Kenrick*.

COLERIDGE J.—Do you ask us then to overrule the recent cases?

Powell. Yes.

(a) 1 Cowp. 323.

(b) 5 Q. B. 49.

(c) 1 Car. & P. 661.

(d) 7 Car. & P. 848.

Lord CAMPBELL C. J.—But how can we do that?

1857.

SHER-
WOOD'S
Case.

Powell. I submit that you have full power to do so. In *Foster v. Jackson* (a) it is said: "And so it is concerning a point of discourse by Judges out of the point of judgment; it may be a judicious and studied opinion, and of some authority, but it is no point of the judgment, for no writ of error lies upon it, and therefore it ought not to presurpate or pre-judicate a judgment." *Balme v. Hutton* (b) and *O'Connell v. The Queen* (c) are to the same effect.

COLERIDGE J.—If a solemn decision of the fifteen Judges is to be overruled, what is to become of the certainty of the criminal law?

Powell. *Rex v. Reed* has been in effect overruled, owing to a disbelief in the existence of the decision.

BRAMWELL B.—Before you ask us to overrule the modern cases, had you not better try to distinguish them?

Powell. In all the modern cases the representation was wholly false. In *Regina v. Abbott* (d) the representation was as to the entire bulk of the cheese. In *Regina v. Burgon* (e) there was no house at all. In *Regina v. Roebuck* (f) there was no silver chain. The pretences in all these cases were totally false. They are all cases in which another and inferior thing was substituted for the thing bargained for. Here the thing bargained for was a load of coal, and a load of coal was supplied. There was merely an overcharge in respect of the quantity. There was no misrepresentation of an antecedent fact.

CRESSWELL J.—What do you say to the representation that the coals had been weighed, and that he produced a ticket showing the weight which he

(a) Hobart's Rep. 53.

(b) 2 Cr. & J. 19.

(c) 11 Cl. & Fin. 155.

(d) 1 Den. C. C. 273.

(e) *Antè*, p. 11.

(f) *Antè*, p. 24.

1857. had made out at the time of weighing? Was not that a representation of a pre-existing fact?

SHER-
WOOD'S
Case.

Lord CAMPBELL C. J.—The case seems to me precisely within the words of the statute.

COCKBURN C. J.—The sale was by the cwt., and not by the load.

Powell. It was the bargain for the load that induced the prosecutrix to part with her money. The payment per cwt. was only the mode agreed upon for ascertaining the sum to be paid. The words “any false pretence” in the statute are not to be taken absolutely, otherwise they would include pretences as to the future as well as the past. The words of the statute have received a technical meaning by decision. If I say fraudulently, I will go to *York* if you will give me 5*l.*, and thereby obtain money and do not go, that is “a false pretence,” but it is not within the statute; but if I falsely say that I have been to *York* and so obtain the money, that is within the statute. Suppose here the prisoner had said, “there is your load of coal, it weighs a ton, pay me 11*s.* 8*d.* for it,” whereas it weighed less than a ton, I submit that would not be a false pretence within the statute.

COCKBURN C. J.—But if he had said, “there in that covered waggon is your load of coal,” and the prosecutrix had thereupon paid him for it, when in fact there was no coal at all in the waggon?

Powell. There the entire representation would have been false. That would have been a very different case. This is the case of a real bargain and sale; and in *Regina v. Oates* (a) POLLOCK C. B. said the statute was not passed with reference to buying and selling transactions when there is a real bargain between the parties. See also the judgments of PARKE B. and WIGHTMAN J. in the same case, and to the same effect.

(a) Dears. C. C. 459.

Lord CAMPBELL C. J.—We have had some very nice questions to determine on this act of Parliament, the 7 & 8 *Geo.* 4. c. 21., upon which great doubt and difficulty have arisen. In this case I feel no doubt or difficulty whatever as to what our decision ought to be. The offence proved seems to me to be clearly within the words and the spirit of the act of Parliament. I ought perhaps not to speak in such very positive terms, when I recollect that there is a case of *Regina v. Reed*, in which a different construction is said to have been put upon the statute. That case was like the present, upon the sale of coals and a misrepresentation of the quantity delivered; and, upon that decision being brought to the attention of my learned Brothers who constituted the Court before whom this case was first heard, they requested that it might be argued before all the Judges, not liking to overrule what was said to be the decision of the twelve Judges in the former case.

1857.

 SHER-
WOOD'S
Case.

Most likely that case, if investigated in its circumstances, would be found to differ essentially from the present; but, if it were on all fours with the present case, I am bound to say that I dissent from it, and that it ought to be overruled.

Now here is an indictment for having obtained a sum of money by false pretences on the sale of coals. I will take the first transaction, which is thus described. The prisoner was a coal dealer; upon the 24th of *December*, 1856, *Phœbe Smith*, the prosecutrix, asked him to sell her a load of coals which he then had; he declined, but said he would fetch a load and sell and deliver it to her at 7*d.* a cwt. from a colliery where he was in the habit of buying. The offer was to sell at 7*d.* a cwt., which she assented to, and he accordingly fetched and delivered to her a load actually to his knowledge weighing only 14 cwt.; he

1857.

SHER-
WOOD'S
Case.

however represented to her that the weight of it was 18 cwt., and that it had been weighed out at the colliery, and he produced a ticket showing such to be the weight, which ticket he stated he had made out himself when the coal was weighed—*Phæbe Smith* thereupon paid him for 18 cwt. Now I cannot doubt that this is a case in which the prisoner is proved to have obtained the sum of 2s. 4d. by a fraudulent representation, that being the sum that he received by saying that there were 18 cwt. instead of 14 cwt. He had stated a specific fact within his own knowledge which was false, and which was most material to *Phæbe Smith*, namely, that he had seen the coals weighed at the colliery and had the weight, 18 cwt., upon the ticket, and that would amount to 28s. He obtained the difference between the price of the 14 cwt. and the 18 cwt., by falsely and fraudulently representing the fact, which induced *Phæbe Smith* to pay that to him. This case seems without any difficulty to be within the act of Parliament. It was not a mere misrepresentation as to the quality of goods during a negotiation for the purchase of them. The prosecutrix parted with a specific sum of money which belonged to her; that sum the prisoner obtained, and he obtained it by a false pretence, with intent to cheat and defraud her of the same. In *Regina v. Reed* the conclusion come to was, that such a case was not within the statute. I must differ from that opinion. But I am relieved from supposing that that case is now overruled for the first time, because the cases of *Regina v. Abbott*, *Regina v. Burgon* and *Regina v. Roebuck* have gone a great deal further, and must be considered as having previously overruled that case. I have no difficulty in saying that this is clearly a case within the act of Parliament, and that the conviction was right.

COCKBURN C. J.—I should have had no difficulty in dealing with a case of this kind, sitting in a Court of Criminal Appeal consisting of five Judges, had it not been for the authority of *Regina v. Reed*, in which there had been a decision of the twelve Judges that a fraudulent misrepresentation as to quantity was not within the statute relating to the obtaining money under false pretences. I therefore desired that this case should be considered in the full Court of Criminal Appeal. I am now prepared to pronounce my opinion that the case of *Regina v. Reed* cannot be sustained. It was decided before the subject of obtaining money by false pretences, and the operation of the statute relating to such offence, had undergone that consideration which that subject has received in more recent cases. I think that, looking to the authority of these cases, and to the language of the act of Parliament, a fraudulent representation as to the quantity of things sold will, under some circumstances, constitute a false pretence within the meaning of the act of Parliament. It is to be observed here that it was not while selling the article that the prisoner represented the quantity to be greater than it was, but, having sold the article and delivered it, when there came to be a question about the price, he represented the quantity to be four hundredweight more than it really was. That representation as to the excess of four hundredweight is equivalent to a representation that he had sold four hundredweight of coals when in point of fact there were no four hundredweight at all; as if he had professed to sell coals contained in a covered waggon, and had represented them to be of a certain weight, when in point of fact there were no coals there at all. It seems to me that the case is within the statute, and that the prisoner was properly convicted.

POLLOCK C. B.—I adhere to the opinion which

1857.

SHER-
WOOD'S
Case.

1857.

 SHER-
WOOD'S
Case.

I have expressed that, at the time this statute was passed, it was not intended to apply to transactions of buying and selling; but I think the distinction pointed out by the Lord Chief Justice of the Common Pleas just this moment obtains in the present case, and suggests to my mind another instance of a similar charge where, though it arises out of a transaction of buying and selling, I have no doubt the statute was intended to apply, and that a conviction would be perfectly proper; that is if, the bargaining and selling being entirely over, and the goods will be transferred from the seller to the buyer upon the payment of their price, the seller were to go and demand payment of the buyer, and the buyer were to say "How much?" and the seller were falsely and fraudulently to say "So much," naming an amount different from that which had been agreed on, and that false representation was for the purpose of obtaining money, which was not in fact due for the goods, and the seller did thereby obtain it, I think he would be guilty of obtaining money by false pretences within the meaning of the statute. I concur, therefore, in the judgment that, in this case, the conviction should be affirmed.

COLERIDGE J.—I am entirely of the same opinion. It is desirable there should be no misunderstanding with reference to the case of *Regina v. Reed*. Lord CAMPBELL said it might be explained if we knew under what circumstances the false representation was made. In point of fact, however, the question arose in arrest of judgment, and so on the face of the indictment, and therefore that case must stand or fall upon its own merits.

CRESSWELL J.—This case is free from the difficulty we have had to encounter in those recently decided cases in which the majority of the Judges said they

felt bound by authority, and not by the reason of the thing. The prisoner falsely pretended that the coals had been weighed at the colliery, and that a ticket stating the weight which he produced had been made out by him there.

1857.

SHER-
WOOD'S
Case.

ERLE J.—I agree that this conviction ought to be affirmed.

CROMPTON J.—I agree in the distinction which has been pointed out.

It is not because a transaction of this kind has originated out of an antecedent contract of sale that an indictment for false pretences, as to matters arising out of such contract, may not be supported.

Here there had been a prior contract for the sale of the coals, and the prisoner, by making a false representation as to the quantity which he had brought in the cart, obtained money by a false pretence, as to a fact alleged by him to exist.

The present resembles the case put by the late Lord Chief Justice of the Common Pleas on a former occasion. He said, supposing he employed a man on a contract to do ditching at one shilling a yard, and when the man comes for his money at the end of the week he says, "I have done 5000 or 6000 yards," whereas he had only done 1000. By making this misrepresentation he gets the money under a false pretence of a fact. I think that the conviction in this case should be affirmed.

CROWDER J.—I also am of opinion that this conviction was right.

WILLES J.—I entirely concur in the judgment; but I wish not to be taken as acquiescing in the opinion that the existence of a contract of sale between the parties will prevent the obtaining money under false pretences, though in conformity with the contract, from being within the statute. I know the

1857.

SHER-
WOOD'S
Case.

opinion of the late Chief Justice of the Common Pleas was to the contrary; and, as at present advised, though I express no final opinion, I think the existence of a contract obtained by fraud ought not to make a difference in favour of the fraudulent person.

BRAMWELL B.—I express no opinion on the last point put by my brother WILLES, but I think this conviction ought to be affirmed. If the prisoner had not known it was short weight, but had innocently stated it was what it appeared to be, and had sold the coals, he would have been guilty of this offence if he afterwards found out the mistake and yet persisted in the assertion that so many hundredweights had been delivered, and thus got the money.

WATSON B.—I think it is not open to us to reconsider the authorities. There are a great many difficulties, notwithstanding those decisions, but I cannot say the conviction in this case is wrong.

CHANNELL B.—I also am of opinion the conviction should be affirmed. It seems to me clear that the prisoner obtained the money which he got for the coals by pretences which he knew to be false, and that he did that with intent to defraud. Those circumstances, taken together, *prima facie* bring the case within the statute. I think that the fact, that those circumstances occurred after the antecedent contract of sale, does not prevent the application of the statute, and that the conviction was right.

Conviction affirmed.

REGINA v. JOHN BRYAN.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of *London*.

At a Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, on the 2nd day of *February*, A.D. 1857, *John Bryan* was tried before me for obtaining money by false pretences.

There were several false pretences charged in the different counts of the indictment; to which, as he was not found guilty of them by the jury, it is not necessary to refer. But the following pretences were among others charged. That certain spoons produced by the prisoner were of the best quality, that they were equal to *Elkington's A*, (meaning spoons and forks made by Messrs. *Elkington*, and stamped by them with the letter A), that the foundation was of the best material, and that they had as much silver upon them as *Elkington's A*. The prosecutors were pawnbrokers, and the false pretences were made use of by the prisoner for the purpose of procuring advances of

The prisoner was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality; that they were equal to *Elkington's A* (meaning spoons made by Messrs. *Elkington* and stamped by them with the letter A); that the foundation was of the best material, and that they had as much silver upon them as *Elkington's A*. The

misrepresentations were made to certain pawnbrokers for the purpose of obtaining, and the prisoner did thereby obtain, advances of money on the spoons, which were in fact of inferior quality and not worth the sums advanced. The pawnbrokers stated that they were induced by the prisoner's misrepresentation, and by nothing else, to advance the money; and that if they had known the real quality of the spoons they would not have advanced money upon them. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as *Elkington's A*, and that the foundations were of the best material, knowing that to be untrue, and that he thereby obtained the money.

Held, by Lord CAMPBELL C. J., COCKBURN C. J., POLLOCK C. B., COLERIDGE J., CRESSWELL J., ERLE J., CROMPTON J., CROWDER J., WATSON B. and CHANNELL B. (WILLES J. *dissentiente* and BRAMWELL B. *dubitante*), that the conviction was wrong.

1857.
BRYAN'S
Case.

money on the spoons in question, offered by the prisoner by way of pledge, and he thereby obtained the moneys mentioned in the indictment by way of such advances. The goods were of inferior quality to that represented by the prisoner, and the prosecutors said that, had they known the real quality, they would not have advanced money upon the goods at any price. They moreover admitted that it was the declaration of the prisoner as to the quality of the goods, and nothing else, which induced them to make the said advances. The moneys advanced exceeded the value of the spoons. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as *Elkington's A*, and that the foundations were of the best material, knowing that to be untrue; and that in consequence of that he obtained the moneys mentioned in the indictment. The prisoner's counsel claimed to have the verdict entered as a verdict of Not Guilty, which was resisted by the counsel for the prosecution; and, entertaining doubts upon the question, I directed a verdict of Guilty to be entered, in order that the judgment of the Court for the Consideration of Crown Cases might be taken in the matter; and the foregoing is the case on which that judgment is requested.

Russell Gurney.

This case was argued on 2nd *May*, 1857, before COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

Hardinge Giffard appeared for the Crown, and *B. C. Robinson* (*F. H. Lewis* with him), for the prisoner.

B. C. Robinson, for the prisoner. This is a mere misrepresentation as to quality. If a man fraudulently

represents a thing to be in specie what it is not, it is a false pretence; but if the representation is merely of the quality of the article, it is not.

1857.

 BRYAN'S
Case.

The Court here intimated that the case had better be argued before the fifteen Judges at the same time as *Regina v. Sherwood (a)*.

The case was accordingly argued on the 11th *May*, 1857, before Lord CAMPBELL C. J., COCKBURN C. J., POLLOCK C. B., COLERIDGE J., CRESSWELL J., ERLE J., CROMPTON J., CROWDER J., WILLES J., BRAMWELL B., WATSON B. and CHANNELL B.

The case was argued immediately after *Regina v. Sherwood (a)*.

G. Francis (with him *Metcalfé*) appeared for the Crown; and *B. C. Robinson* (with him *F. H. Lewis*), for the prisoner.

B. C. Robinson, for the prisoner. This is simply a misrepresentation of quality, and is not within the statute. A representation that a thing is in specie, that which it is not, has been held to be within the statute, but there is no authority to show that a mere misrepresentation of the quality of an article is.

Lord CAMPBELL C. J.—With regard to quality it has been said that it is lawful to lie. The seller exaggerates, and the buyer depreciates, the quality. The only specific fact here is that the spoons were equal to *Elkington's A*.

B. C. Robinson. All the representations are mere vaunting or puffing of goods. I cannot contend that the prisoner did not tell a wilful lie; no doubt he did; but the articles he proposed to pledge were plated spoons; and they were plated spoons, although of an inferior quality to that which he represented them to be. In *Regina v. Roebuck (b)*, the chain was repre-

(a) *Antè*, p. 251.(b) *Antè*, p. 24.

1857.
BRYAN'S
Case.

sented to be silver, when it was not silver but base metal. In *Regina v. Abbott* (a), the cheese was not of the kind it was represented to be; the bulk of the cheese was said to be the same as the taster, when it was not. To make this case analogous to those, the representation must have been that the spoons were actually *Elkington's A*, and not equal to *Elkington's A*.

POLLOCK C. B.—Would it be indictable to say that a cheese came from a particular dairy when it did not?

B. C. Robinson. That would be a much stronger case than this, and would resemble *Regina v. Abbott*; but if this conviction is good, a man selling beer as treble X, when it was double X, would be indictable, and who is to decide between buyer and seller in such cases?

COLERIDGE J.—If mere puffing by the seller would be indictable, depreciation by the buyer would be equally so. “It is nought, it is nought, saith the buyer, but when he goeth his way he boasteth.”

B. C. Robinson. If the representation had been that the spoons were in fact *Elkington's A*, this case would have resembled *Regina v. Dundas* (b), where a spurious blacking was sold as blacking of *Everett's* manufacture, and *Regina v. Ball* (c), in which articles were represented to be silver which were not silver. In both those cases the misrepresentation was as to the species, not as to the mere quality of the article. If such representations were to be held to be within the statute, trade could not be carried on with safety. The jury would in each case be made the judges of the offence; quality being in most cases a matter of opinion only.

(a) 1 Den. C. C. 273.

(b) 6 Cox C. C. 380.

(c) Car. & M. 249.

G. Francis, for the Crown. This is in fact a misrepresentation of quantity, and substantially the same as *Regina v. Sherwood*.

1857.

BRYAN'S
Case.

LORD CAMPBELL C. J.—Of the quantity of the silver?

G. Francis. Yes. *Elkington's A* is an article of ascertained manufacture, and by representing the spoons to be equal to *Elkington's A*, the prisoner represented that they were covered with the same quantity of silver as *Elkington's* spoons would be covered with. The money was therefore obtained by a false representation that there was a greater weight of silver than there really was, and therefore there was a false pretence of an existing fact within the statute. Secondly, if the representation was of quality merely, it is within the statute; the money was obtained by the representation, and the jury have found the representation was made with intent to defraud.

B. C. Robinson, in reply. The articles were of the species represented.

POLLOCK C. B.—Suppose a publican represents that his beer is not really *Guinness's* beer, but equal to *Guinness's*?

LORD CAMPBELL C. J.—The goods were the goods bargained for, but of inferior quality.

BRAMWELL B.—What would you say to the sale of a paste pin for a diamond pin?

B. C. Robinson. There the species would not be the same; but it would not do if the representation was that the diamond was “of the first water” when it was not.

LORD CAMPBELL C. J.—I am of opinion that this conviction cannot be supported. It seems to me to proceed upon a mere misrepresentation, during the bargaining for the purchase of a commodity, of the

1857.

BRYAN'S
Case.

quality of that commodity. In the last case which we disposed of (a), after the purchase had been completed, there was a distinct averment, which was known to be false, respecting the quantity of the goods delivered, and in respect of that misrepresentation a larger sum of money (the amount of which could be easily calculated) was received by the person who sold them than he was entitled to ask, and therefore I thought, and I think now, that that was clearly a case within the act of Parliament; but here, if you look at what is stated upon the face of the case, it resolves itself into a mere misrepresentation of the quality of the article; and, bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, although the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the Legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. Such an extension of the criminal law is most alarming, for not only would sellers be liable to be indicted for exaggerating the good qualities of the goods, but purchasers would be liable to be indicted if they depreciated the quality of the goods, and induced the sellers, by that depreciation, to sell the goods at a lower price than would have been paid for them had it not been for that representation. As yet I find no case in which a mere misrepresentation at the time of

(a) *Regina v. Sherwood*, ante, p. 251,

sale of the quality of the goods has been held to be an indictable offence. In *Regina v. Roebuck* (a) the article delivered was not of the species bargained for; there the bargain was for a silver chain, and the chain was not of silver, but was of some base metal, and was of no value. But here the spoons were spoons of the species that was bargained for, although the quality was inferior. It seems to me therefore that this is not a case within the act of Parliament, and that the conviction cannot be supported.

1857.

 BRYAN'S
Case.

COCKBURN C. J.—I am of the same opinion, and for the same reasons as those which have been just pronounced by my Lord. It seems to me to make all the difference whether the man who is selling merely represents, as in this instance it appears he did, the articles to be better in point of quality than they really are, or whether, as in the case of *Regina v. Roebuck*, he represents them to be entirely different from what they really are. There the representation was that the things were silver, when in point of fact they were of base metal and entirely different from what they were represented to be. Here, if the person had represented these articles as being of *Elkington's* manufacture, when in point of fact they were not, and he knew it, that would be an entirely different thing; but the representation here made was only a vaunting and exaggerating of the value of the article in which he was dealing, by representing it to be in quality equal to a particular manufacture. I think that makes an essential difference between this case and the cases referred to, and I concur with my Lord in opinion that the conviction cannot be supported.

POLLOCK C. B.—There may be considerable difficulty in laying down any general rule which shall be

(a) *Antè*, p. 24.

1857.

BRYAN'S
Case.

applicable to each [particular case; but I continue to think that the statute was not meant to apply to the ordinary commercial dealings between buyer and seller; still I am not prepared to lay down the doctrine in an abstract form, because I am clearly of opinion that there might be many cases of buying and selling to which the statute would apply—cases which are not substantially the ordinary commercial dealings between man and man. I think if a tradesman or a merchant were to concoct an article of merchandize expressly for the purpose of deceit, and were to sell it as and for something very different even in quality from what it was, the statute would apply. So, if a mart were opened, or a shop, in a public street, with a view of defrauding the public, and puffing away articles calculated to catch the eye, but which really possessed no value, there, I think, the statute would apply; but I think the statute does not apply to the ordinary commercial transactions between man and man, and certainly, as has been observed by the Lord Chief Justice, if it applies to the seller it equally applies to the purchaser, although it is not very likely that cases of that sort would arise. It would be very inconvenient to lay down a principle that would prevent a man from endeavouring to get the article cheap which he was bargaining for, and that if he was endeavouring to get it under the value he might be indicted for obtaining it for less than its value; and there is this to be observed, that if the successfully obtaining your object, either in getting goods or money, is an indictable offence, any attempt or step towards it is an indictable offence as a misdemeanor, because any attempt or any progress towards the completion of the offence would be the subject of an indictment, and then it would follow from that, that a man could not go into a broker's shop and

cheapen an article but he would subject himself to an indictment for misdemeanor in endeavouring to get the article under false pretences. For these reasons I think it may be fairly laid down that any exaggeration or depreciation in the ordinary course of dealings between buyer and seller during the progress of a bargain is not the subject of a criminal prosecution. I think this case falls within that proposition, and I therefore think this conviction cannot be supported.

1857.

 BRYAN'S
Case.

COLERIDGE J.—I am of the same opinion; and, as far as disposing of this particular case, I should like to do it very much upon the grounds stated by Lord CAMPBELL and the Lord Chief Justice. I am glad, however, to have the opportunity of saying also that I agree with the proposition laid down by my Lord Chief Baron in the latter part of his observations, as it seems to me that it would be a dangerous thing to say that there could be no fraudulent misrepresentation within the statute in the course of an ordinary transaction of buying and selling. I think it may as often occur in the course of a real transaction of buying and selling as in any other way; but in order to determine whether a fraudulent misrepresentation is or is not within the statute, I think you must look, among other things, to the extent to which it goes and the subject-matter to which it is applied. It seems to me to be a safe rule to say,—where it applies simply to the quality, and is only in the nature of an exaggeration on the one hand or a depreciation on the other, which too frequently takes place even in tolerably honest transactions between parties, this is not the subject of a criminal proceeding. If you were to make such a representation the subject of a criminal prosecution under the statute or at common law, you would be not only multiplying prosecutions to a most inconvenient extent, but in a number of

1857. instances do great injustice, and would be making a party answer criminally where in truth he had no criminal intent in his mind.

BRYAN'S
Case.

CRESSWELL J.—I agree that this conviction is not to be sustained. I am afraid that the law upon this subject of false pretences is in a state which is well calculated to embarrass those who have to administer it. This case is distinguishable from *Regina v. Abbott (a)* and *Regina v. Roebuck (b)*; but, if I may refer to what I said on a former occasion, I then said I feel bound by authority and I act upon it. I therefore think those cases ought to be binding, unless a time should arrive when they are overruled by an unanimous decision of the whole of the Judges. In this instance the case is distinguishable, and we are not bound by them, and I think this conviction cannot be supported.

ERLE J.—I am also of opinion that this conviction cannot be sustained, not on the ground that the falsehood took place in the course of a contract of sale or pawning, but on the ground that the falsehood is not of that description which was intended by the Legislature. It is a misrepresentation of what is more a matter of opinion than a definite matter of fact. Whether these spoons in their manufacture, and in the electrotype, were equal to *Elkington's A* or not, cannot be, as far as I know, decidedly affirmed or denied in the same way as a past fact can be affirmed or denied, but it is in the nature of a matter of opinion. I fully concur in what has been said, that the statute never intended, in the course of commercial transactions, to allow a party who is dissatisfied with his bargain to resort to a complaint of any exaggerated praise of the article which has been purchased, and call the seller before a jury to be indicted for that;

(a) 1 Den. C. C. 273.

(b) *Antè*, p. 24.

and on this ground I am of opinion that the present case is not within the statute; but, as to the other ground, it seems to me not only are contracts for sale not intended to be excluded by the statute, but on the contrary the statute was precisely intended to make falsehoods in respect of contracts of sale indictable. The statute recites that there had been a failure of justice by reason of cheats not amounting to larceny, and it therefore makes the obtaining of goods by false pretences an indictable misdemeanor. Now what were the cheats which were not amounting to larceny in respect of the prosecution of which there had been a failure of justice? I think that those cheats were the cases either where a person, intending to defraud another of his goods by a false pretence in purchase, obtained from him a transfer of the property in the goods, he intending not to give the value of them, or where, by a false pretence in sale, a man put off upon another a counterfeit article which he knew was not truly the article intended, and so got money paid for the specific thing shown, that being apparently what the buyer intended, but being in reality a totally different thing; the property was under those circumstances held to have passed, and the matter was held to have amounted to a cheat; at the same time, where a party intended to part with the possession only, and a fraudulent person obtained the article *animo furandi*, and took it off, although the possession was so passed to him, still it was held to be no transfer of the property in law, but the property remained in the owner notwithstanding, as in the ordinary case of a man coming up to the seller of a horse at a fair and saying, "Allow me to try that horse:" if he rode it away and sold it, and the jury was of opinion that he got this possession *animo furandi*, it was a larceny; but if he professed to the seller of the horse, "I buy your

1857.

BRYAN'S
Case.

1857.
BRYAN'S
Case.

horse," and paid by a false cheque, or deceived by a false pretence of future payment, and the seller said, "I agree to that," although the jury found that he did this *animo furandi*, he was held to be not guilty of larceny before the statute, which seems to make persons responsible criminally when there was a contract of sale falling within the same category of criminal intention as the cases I have adverted to, where the possession only had been obtained *animo furandi*. Now, looking at all the cases that have been decided upon the statute, those that have been the subject of the greatest comment appear to me to fall within the principle relating to putting off counterfeit articles in sales where the substance of the contract is falsely represented, and by reason thereof the money is obtained. In *Regina v. Roebuck* (a) the thing sold was not the thing which it was sold for—a silver chain. Here silver, though in form an adjective, is in reality the substance of the contract. The silver-smith had no intention of buying a chain, but he intended to buy silver, and what was represented to him to be silver was not silver, though it was a chain; the property in the chain passed, and the money was paid, still clearly there was a false pretence as to the silver; and so in the case of *Regina v. Ball* (b); so also in the case of *Regina v. Abbott* (c), the substance of the contract was not a mere cheese, a thing in the shape of a cheese, of any quality, but the substance of the purchase was a *Cheddar* cheese (or some other species of cheese), and the taster which a fraudulent person had inserted in the cheese sold was of that species, and it was sold with a false affirmation that the article was *Cheddar* cheese, which would be a totally different article from the *Gloucester* cheese, or

(a) *Antd*, p. 24.

(b) Car. & Marsh. 249.

(c) 1 Den. C. C. 273.

whatever the substance was said to be of the cheese that was sold. In the case of *Everett's* blacking (a) it is the same thing. We have it in evidence, in that case, that a new blacking, saleable in the neighbourhood under the name of *Everett's* blacking, was a vendible article; the prosecutor purchased it for the purpose of retailing it, and unless it had been *Everett's* blacking he would have had no demand for it; the question whether it was *Everett's* blacking was as to the substance of the article; it was not a blacking he wanted, it was *Everett's*; and though it is in form an adjective it is in reality the substance of the bargain. These are cases of putting off counterfeit articles. As to the case of *Regina v. Kenrick* (b): although in the case of *Rex v. Pywell* (c) it had been held not indictable to praise the quality of a horse, knowing him not to be worthy of the praise put upon him, yet in *Regina v. Kenrick*, as far as I understand it, and I was counsel for the man, the fact which brought the case within the definition of the crime was the fact that *Kenrick* averred that the horses had been the property of a lady deceased, were now the property of her sister, had never been the property of a horse dealer, and were quiet and proper for a lady to drive. The purchaser wanted those horses for a woman of his family. The substance of the contract, in his mind, was that they were the property of a lady who had driven the horses, and it was a false assertion of a definite existing fact to say "They are the property of her sister now," when they were in fact the property of a horse dealer, and had run away and produced a fatal accident. The case of *Regina v. Kenrick* was

1857.

 BRYAN'S
Case.
(a) *Regina v. Dundas*, 6 Cox C. C. 380.

(b) 5 Q. B. 49.

(c) 1 Stark. R. 402.

1857.

BRYAN'S
Case.

not the warranting a horse sound, as in the case of *Rex v. Pywell*, but it was the affirming a false fact which the party knew to be false, and on that ground the conviction proceeded. It seems to me that these cases, which have given rise to a great deal of observation, fail to bear out the principle contended for by the prosecution. No doubt it is difficult to draw the line between the substance of the contract and the praise of an article in respect of a matter of opinion; still it must be done, and the present case appears to me not to support a conviction, upon the ground that there is no affirmation of a definite triable fact in saying the goods were equal to *Elkington's A*, but the affirmation is of what is mere matter of opinion, and falls within the category of untrue praise in the course of a contract of sale, where the vendee has in substance the article contracted for, namely, plated spoons.

CROMPTON J.—I also think that this conviction cannot be supported. I think that the statute of false pretences ought not to be construed to extend to transactions where, in the course of a bargain for a specific chattel, the supposed misrepresentation consists in mere praise or exaggeration or puffing of a specific article to be sold, where the purchaser gets some value for his money; where the thing sold is of an entirely different description from what it is represented to be and of no value whatever, as where a man passes off a chain of base metal for gold or silver, and the buyer really gets nothing for his money, the case is different. This was the ground of the opinion of some of the Judges in *The Queen v. Roebuck*. So where money is obtained for notes of the Bank of *Elegance* by the pretence that they are notes of the Bank of *England*, the cases show that there is a false pretence.

I do not however think that the statute was intended to apply to every case of a warranty where there is a real sale and where, in the course of bargaining for a specific chattel, one party praises and exaggerates, or the other party depreciates, the description and quality of the thing to be sold, and where something is got by the bargain; in such cases the party gets a worse bargain for his money, and what he really loses is the difference between the good and the bad thing. No specific money or chattel is obtained by the false pretence or lost by the buyer, but the real loss is for damage by having a worse bargain, and from the difference in value between the thing sold and what it would have been worth if the representation were true, which sounds only in damages.

1857.

 BRYAN'S
Case.

I think that it would be dangerous to construe the statute as extending to every case of a false warranty, and I think that this conviction should be quashed.

CROWDER J.—I am of opinion that the conviction is bad. I think this case goes further than any of the cases that have yet been decided, and I am clearly of opinion that they have gone quite far enough and ought not to be extended. I think the distinction that has been taken in this case ought to exclude it from the category of those decisions: the distinction being that the false statement is with respect to the quality only of a known specific article, viz., plated spoons. It was true that they were plated spoons, but it was false that the plating was of a quality equal to that which was then known as *Elkington's A*. Now the cases that have already been decided in respect to contracts of sale and other dealings between parties have not gone beyond this, that where the subject-matter about which the parties have been dealing is of a specific denomination, and that denomination is

1857.

BRYAN'S
Case.

falsely given, it has been held to be a false pretence; but the present case is a step beyond that; and, as I am very doubtful whether the statute was ever intended to go the length to which the decisions have carried it, I am of opinion it ought not to be extended further, and that it could not be so extended without confounding the distinction between civil and criminal cases. I have therefore come to the conclusion that this conviction cannot be supported.

WILLES J.—My opinion is of little value after those which have been expressed; but such as my opinion is, I am bound to pronounce it, and I do so with the less diffidence because it was the considered opinion of the late Chief Justice *Jervis*, than whom no man who ever lived was more competent to form an opinion upon the subject. I am of opinion that the conviction was right, and that it ought to be affirmed. It appears to me that a great number of observations have been brought to bear upon the construction of the statute which would not have been attended to if the words of the statute had been looked at, and I cannot help thinking that in many of the cases to which reference might be made, and they are very numerous, upon this subject, the judgments would have commanded more attention in after times if the words of the statute had been attended to, and those who delivered those judgments had not permitted themselves to consider, instead, whether a particular view would or would not be convenient to trade, either in its present state or in the state to which it might be reduced by a proper administration of the law. I think that the words of the statute should be implicitly followed, and the Legislature obeyed according to the terms in which it has expressed its will in the 53rd section of the 7 & 8 *Geo.* 4. c. 29. I am looking to the words of that section, and I am unable to bring myself to think

that the Legislature was at all dealing with anything in the nature of a distinction between the case of property fraudulently obtained by a fraudulently obtained contract and goods obtained without any contract, but fraudulently obtained. I cannot help thinking that if the attention of the framers of the statute had been directed to any such possible operation of it, they would, in the spirit in which the section is framed, have enacted, in terms even more clear than those of the 53rd section, that that which is obtained by fraud shall not benefit the fraudulent person, and that the interposition of a contract also obtained by fraud ought not to make any difference in favour of the cheat. The section commences with the recital that "a failure of justice frequently arises from the subtle distinction between larceny and fraud." That is the recital, and I had on my mind an impression that the recital of a statute may have the effect of enlarging, but not of restraining, the operation of the subsequent enactment. The enacting part of the section is, "If any person shall by any false pretence obtain from any other person any chattel, money, or valuable security with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor." And it appears to me that the only proper test to apply to any case is, whether it was a false pretence by which the property was obtained, and whether it was obtained with the intention to cheat and defraud the person from whom it was obtained.

1857.

 BRYAN'S
Case.

Now in this case it should seem that there was a false pretence; there was a pretence that the goods had as much silver upon them as *Elkington's A*, and there was also the pretence that the foundations were of the best material. If I could bring myself to take the view which my brother ERLE has taken, that this was mere matter of opinion, and not matter of fact, which

1857.

BRYAN'S
Case.

could be ascertained by inspection or calculation, possibly I might take the same view of the case ; but it appears to me that, on the face of the case, it should seem that *Elkington's A* must have been, for practical purposes, a fixed quantity ; the quantity of silver on it must have been fixed, and the proper material, the best material for the foundation of such plated articles, must have been a well known quality in the trade, because it appears that the prisoner made a statement with respect to the quantity of silver, and the quality of the foundation, with the intent to defraud. It appears that the persons who made the advances were thereby defrauded, and thereby induced to make the advances, and the jury have found that the statements were known by the prisoner to be untrue, and that in consequence of those statements he obtained the money mentioned in the indictment. It appears to me that for all practical purposes that ought to be taken to be a sufficient fact, coming within the region of assertion and calculation, and not mere opinion, and that it should be considered as a false pretence. Well, then the statute says—"obtain from any other person any chattel, money, or valuable security." It is found in this case that the money was obtained. If the matter was a simple commendation of the goods, without any specific falsehood as to what they were ; if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would have been easily disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any such conclusion as that praise of that kind should have the effect of making the party resorting to it guilty of

obtaining money on a false pretence. I say nothing on the effect of a simple exaggeration, except that it appears to me it would be a question for the jury in each case whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a misrepresentation of a specific fact material to the contract and intended to defraud, and did defraud, and by which the money in question was obtained. Well, then there is the latter part of the section—"with intention to cheat and defraud any person of the same." It must be with the intent to cheat and defraud the person of the same. I am unable to bring my mind to any anxiety to protect persons who make false pretences "with intent to cheat and defraud." It was stated in the evidence by the prosecutor, "I would have advanced nothing but for the misrepresentation," and it was found by the jury that the money was obtained by the misrepresentation. But it is said that the effect of establishing such a rule as that for which I contend would be to interfere with trade; no doubt it would, and I think ought to, prevent trade being carried on in the way in which it is said to be carried on. I cannot help expressing my regret if trade is carried on, and I do not believe it is generally carried on, by persons making false pretences with the intention to cheat or defraud persons of their money. I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening on the other; those are things persons may expect to meet with in the ordinary and usual course of trade; but I cannot help thinking that people ought to be protected from any such acts as those I have referred to being resorted to for the purpose and with intent to cheat or defraud purchasers of their money or

1857.

BRYAN'S
Case.

1857.

 BRYAN'S
Case.

tradesmen of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a great extent, and, amongst others, in this form. I agree in what the late Chief Justice *Jervis* said as peculiarly applicable to such a supposed state, though I hope not to ordinary trade, that if there be such a commerce as requires to be protected by the statute being limited in the mode suggested, it ought to be made honest and conform to the law, and not the law bent for the purpose of allowing fraudulent commerce to go on. I cannot help thinking, therefore, upon the plain construction of the 53rd section of the 7 & 8 *Geo.* 4. c. 29., that the prisoner in this case, having fraudulently represented that there was a greater amount of silver in the articles pledged and that there was a superior foundation of metal, that being untrue to his knowledge, for the purpose of defrauding the prosecutors of their money, which he accordingly obtained, he was therefore indictable, and that the conviction ought to be affirmed.

BRAMWELL B.—I regret being called on to give judgment in this case without an opportunity of further considering it; but the inclination of my opinion is, that this conviction ought to be sustained. I can understand the statute in two ways, one that it only applies to those cases where there is no contract, and the chattel or money is got by false pretences, either without or independently of any contract, as in the last case (*a*), where, though, had there been no fraud in the making of the contract, there was in the assertion that the things delivered were of a certain amount; the other, that the statute was intended never to apply to cases where the fraud was not the immediate cause, or sole cause, of obtaining the

(a) *Regina v. Sherwood*, *antè*, p. 251.

money; but the contract was obtained by fraud, and the money or the article handed over to the person in pursuance of that, or of that and something given by the fraudulent person. The first case is clearly within the statute, and the inclination of my opinion is, the statute does extend to cases such as last mentioned; but with great doubt; for it may well be that the statute does not apply except when the money or chattel is obtained immediately by the fraud, and does not apply where the chattel or money is obtained by a contract, which contract is obtained by fraud; so also it may be that the statute does not apply to cases where the fraud is not the sole cause of the delivery or giving of the chattel or money, or where something is delivered or given, as well as fraud used, by the fraudulent person, as it may be said that the money or chattel is not obtained by fraud, which means fraud alone, since, but for the delivery or giving of something by the fraudulent person, he would have obtained nothing. I can understand the statute being limited to the first class of cases or extended to both; but I declare I cannot understand the medium course suggested to-day, namely that the statute does apply to some of the cases in the second class, but does not apply when the person defrauded gets in specie the thing contracted for, though with a difference in the quality.

Take this present case. I do not know that I am influenced by the fact, but we were told last time that in truth there was no silver on these things, and that as compared with *Elkington's* they were valueless. Now it seems to be supposed that the misrepresentations were no more than a kind of praise, exaggeration, or puffing. I confess I cannot comprehend that, and as well as I can understand the opinions that have been expressed, this result would follow, that,

1857.

BRYAN'S
Case.

1857.

BRYAN'S
Case.

suppose *Elkington's* plated articles had got half an ounce of silver on them and the prisoner's articles had got none, he would have been indictable; but, if *Elkington's* had got one ounce of silver and the prisoner's only a quarter of an ounce, he would not, because it would have been only the superior quality that was exaggerated. I own I cannot understand that. I cannot help looking at the statute and I find nothing about exaggeration of quality. I find the statute express,—“if any person shall by any false pretence obtain from any other person any chattel or valuable security,”—that means, to my mind, whether he obtains it by fraud directly or indirectly and wholly by fraud, or by that and something else. Therefore it seems to me the only true exposition of the statute is, to hold it either to apply or not apply to all contracts and cases where the fraudulent person gives something in return,—either to say that whenever there is a contract or something is so given it is not within the statute, or to say it is, though there is a contract, if that contract was brought about by fraud, though something may have been delivered to the person defrauded, if, but for the fraud, the contract would not have been entered into. As at present advised I incline to think the true meaning of the statute is, that it shall extend to people who make these bargains by fraud, and so by the fraud get possession of the chattels or property of others; and I incline to hold the conviction right.

WATSON B.—I am of opinion that the conviction is wrong. I think that the cases which have been decided upon this subject have gone quite far enough, and I believe much further than the framers of the statute ever intended it should go. I agree with my brother CROWDER in this point, that this case does not fall within any of those decisions that have been

referred to that are now to be considered authorities. In my opinion the conviction is wrong. The question is this, whether this representation, false as it may be, merely of the quality of the article which is pawned, as it would be upon a sale, is a false pretence within the meaning of the statute. In my opinion it is not. All that is represented here is, that it was of the first quality, equal to *Elkington's A*, and the foundation of the best material, and had as much silver as *Elkington's*,—in ordinary language merely puffing the article, which may be untrue. In an ordinary case, if a party wishes to protect himself, he ought to take a warranty of the quality of the article offered for pawn or sale. The result of holding this conviction right would be, that on every sale, where any exaggeration has taken place, the tradesman might be convicted for obtaining money on false pretences. For these reasons I think it is not a false pretence within the statute, and therefore the conviction was wrong.

CHANNELL B.—I am of opinion that the conviction cannot be sustained. But for the doubt expressed by my brother BRAMWELL, and the more decided opinion expressed by my brother WILLES, I should have contented myself with saying that I concurred in the judgment of the other members of the Court ; but I think it right, under the circumstances, to state the grounds of my opinion. A certain number of spoons were produced to the prosecutor ; those spoons were represented, not as silver spoons, but as having silver upon them ; there was then the further representation that they had as much silver as *Elkington's A*, and further that the foundations were of the best material. I consider the spoons were the same in species as they were represented to be. It is not as if the purchaser had been induced, by the representations

1857.

BRYAN'S
Case.

1857. **BRYAN'S Case.** made, to buy them for silver, and then had found that the spoons had no silver upon them. The representation is that the quantity of silver on them was equal to the quantity on *Elkington's*. I consider that is, in substance, the same as if he had said the quality of the silver upon them is the same as on *Elkington's*, and that the statute does not apply to such a representation, made in language which the prosecutor must be taken to know is mere matter of opinion. On that point the case is distinguishable from *Reg. v. Roebuck*, the ground of that decision being that the representation was that a certain chain was a silver chain when in fact it was not, and therefore did not resemble at all the article intended. In this case the spoons did correspond to that extent with the representation, and they were spoons of some value, supposing value to be an element to be taken into consideration. The other case of *Reg. v. Abbott* is plainly distinguishable, upon the ground put by Mr. *Robinson*. On these grounds I am clearly of opinion that the conviction cannot be supported.

Conviction quashed.

See also 162 162

1857.

REGINA v. WILLIAM GAYLOR.

The prisoner was convicted of manslaughter. It appeared that the prisoner procured sulphate of potash and

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by ERLE J.

The prisoner *Gaylor* was indicted before me at the last *November* Session of the Central Criminal Court gave it to his wife intending her to take it for the purpose of procuring abortion; and that she, believing herself to be pregnant, although in reality she was not, took the sulphate of potash in the absence of the prisoner, and died from its effects. *Held*, that the conviction was right.

1857.

GAYLOR'S
Case.

for manslaughter. The facts were, that his wife's death was caused by swallowing sulphate of potash for the purpose of procuring abortion, she believing herself to be pregnant, although in reality she was not. The prisoner purchased this sulphate of potash, and gave it to his wife in order that she might swallow it for the above mentioned purpose, but he was absent at the time when she so swallowed it. For the prosecution it was contended that the wife committed a felony in so swallowing the sulphate of potash, and, as death ensued therefrom, she also committed murder (*Rex v. Russell*, 1 Moo. C. C. 356); that the prisoner was an accessory before the fact to this felony and to the consequent murder, and might be tried as if the principal had been convicted under 11 & 12 Vict. c. 46. s. 1.; and that, although the evidence showed his offence was murder, yet that would support an indictment for manslaughter. Under my direction the jury convicted. The prisoner was discharged on recognizance, and I reserved for the opinion of the Court the following questions :—

1st. Was the deceased guilty of felony in administering sulphate of potash to herself for the purpose of procuring abortion, she not being pregnant?

2nd. Was the husband by his act guilty of felony, or an accessory thereto, he having been absent when she swallowed the drug?

3rd. If the husband was an accessory to the felony, was an indictment for manslaughter supported, it being laid down that there cannot be an accessory to manslaughter? (*Hale's P. C.*) (a).

4th. Can the indictment be supported under 11 & 12 Vict. c. 46. s. 1. (b)?

(a) 2 Hale P. C. 246.

(b) That section enacts,—“That . . . Act, if any person shall become an accessory before the fact to any felony, whether the same be a

1857.
 GAYLOR'S
 Case.

If the answer to any of these questions shall entitle the prisoner to an acquittal, a verdict of Not Guilty shall be entered.

W. ERLE.

This case was argued on 15th *November* 1856, before POLLOCK C. B., ERLE J., WILLES J., BRAMWELL B. and WATSON B.

Joseph Payne appeared for the Crown, and *Ribton* for the prisoner.

Ribton, for the prisoner. I propose first to consider the third question, and I contend that, even if the prisoner was an accessory to the felony, the conviction cannot be supported, inasmuch as there cannot be an accessory to manslaughter.

Payne, as to the first point, referred to *Regina v. Mary Goodhall* (a), in which on an indictment against the prisoner, under 1 *Vict.* c. 85., for using an instrument with intent to procure the miscarriage of another woman, it was held to be immaterial whether the woman was pregnant or not.

POLLOCK C. B. — That was under the particular statute. A woman taking a drug to procure abortion may be guilty of an offence at common law, but not so if she were not pregnant at the time. Here it is difficult to see that the woman committed any felony at all.

Ribton. This was an ordinary indictment for manslaughter. The prisoner was not present when the drug was taken, so that he could not be a principal, and then the question arises whether^a there can be an accessory before the fact of the crime of

felony at common law, or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted and pun-

ished in all respects as if he were a principal felon."

(a) 1 Den. C. C. 187.

manslaughter? I contend that there is no such offence known to our laws. In 1 *East P. C.* 218, it is expressly laid down that, "though there may be several principals, there cannot be any accessories before to manslaughter, because it must be done without premeditation; but there may be accessories after."

1857.

 GAYLOR'S
Case.

Manslaughter is an unpremeditated homicide, except where it is *se defendendo*, and a man cannot counsel an unpremeditated act. In 2 *Hale's P. C.* 437 it is said, "In manslaughter there can be no accessories before the fact, for it is presumed to be sudden; for if it were with advice, command, or deliberation, it is murder and not manslaughter, and the like of *se defendendo*."

BRAMWELL B.—Suppose a man, for mischief, gives another a strong dose of medicine, not intending any further injury than causing him to be sick and uncomfortable, and death ensues, would not that be manslaughter? Suppose, then, another had counselled him to do it, would not he who counselled be an accessory before the fact?

Ribton. There are cases which go to show that that would be murder, because of the malice. Lord *Hale* refers to *Bibithe's case* (a), in which it is said, that if *A.* be indicted of murder and *B.* as accessory before by procurement, &c., and *A.* is found guilty only of manslaughter, *B.* shall be discharged.

ERLE J.—If the manslaughter be *per infortunium* or *se defendendo*, there is no accessory; but there are other cases in which there may be accessories. That seems to be the solution of Lord *Hale's* dictum.

Payne, for the Crown. There are cases which show that the doctrine alleged to be laid down by Lord *Hale* must not be taken without limitation.

(a) 4 Co. Rep. 43 b, cited 2 Hale, 437.

1857.

GAYLOR'S
Case.

For instance, in the case of a prize-fight, where a man is present at first, encourages the combatants, but is not present when the blow is struck from which death ensues. So also in the case of *mala praxis* in a medical man, or the case of the rash administration of medicine in consequence of which death ensues.

As to the first point, I contend that the deceased was guilty of felony in administering the drug to herself. She did an act which was not lawful, and which caused her own death, and was therefore *primâ facie* guilty of murder. Every killing is *primâ facie* murder, even homicide *per infortunium*.

POLLOCK C. B.—You say that the act of taking a substance that was not intended to kill her was an unlawful act on her part because it happened to kill her. If a man eats too much at dinner, and dies in the night of apoplexy, is he guilty of murder? If I, believing that there is a person in an adjoining room, when in fact there is no one there, fire a pistol through the doorway with the intention of killing him, I have committed no act cognizable by the criminal law, although, morally, I am just as guilty as if I had shot the man.

Payne. If, under such circumstances, a man, intending to shoot another person, shot himself, he would be guilty of murder. Here the prisoner put it in his wife's power to kill herself by giving her a sufficient quantity of medicine to cause her death, intending that she should take it for the purpose of procuring abortion; and death ensues in consequence of her doing the very act which he contemplated.

In *Rex v. Russell* (a) it was decided, that if a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder,

(a) 1 Moo. C. C. 356.

N.B. /

whether she was quick with child or not, and that a person who furnished her with the poison for that purpose, will, if absent when she took it, be an accessory before the fact.

1857.

 GAYLOR'S
Case.

ERLE J.—The man was an accessory before the fact to the woman taking the drug with intent to procure abortion. This would in my opinion be murder, if she died in consequence of taking that drug. The grand jury, however, found that it was manslaughter. If a man is indicted for manslaughter, and it turns out to be murder, he may be found guilty of manslaughter. I thought the prisoner was guilty of murder, and might therefore be convicted of manslaughter.

Ribton, in reply. The prisoner was tried for manslaughter; and, if he was guilty of anything, it was of being accessory before the fact to murder; and he could not plead *autrefois convict* if he were to be subsequently tried for murder.

POLLOCK C. B.—If it is found that he did not kill, *à fortiori* he did not murder.

ERLE J.—According to the doctrine laid down in *Foster's P. C.* (a) an acquittal of manslaughter would be a bar to an indictment for murder. If the man were acquitted of the manslaughter he might say, "I did not kill the deceased at all."

Cur. adv. vult.

On 24th January, 1857, judgment was given, affirming the conviction.

Conviction affirmed.

(a) See *Foster P. C.* 329; 2 *Hale.P. C.* 246.

1857.

REGINA v. EDWARD AUTEY.

The prisoner was convicted upon an indictment which charged him in one count with uttering a warrant, and in another with uttering an order, for the payment of money. A dividend warrant of a railway company, signed by the secretary and addressed to a banker, required the latter to pay the amount named in the warrant to a certain shareholder or order, and to charge the same to the company's revenue account. It was stated on the warrant that the shareholder's name must be indorsed at the back, and it was proved that the banker would not pay the money even to the shareholder himself without such indorsement. The prisoner uttered this dividend warrant knowing that the indorsement of the shareholder's name thereon was a forgery. *Held*, that the forgery of the signature of the shareholder was a forgery of the entire document; that such document was properly described as a warrant or order for the payment of money, and that the conviction was right.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by CROMPTON J.

The prisoner *Edward Autey* was tried and convicted before me at the last Assizes for the county of *York*, upon an indictment charging him in one count with uttering a warrant for the payment of money, and in another count with uttering an order for the payment of money.

The prisoner was in the employment of the *Leeds, Bradford and Halifax Junction Railway Company*, and it was the duty of him and a fellow clerk to fill up the dividend warrants payable to the proprietors, and to place the stamps on them, and put the initials of the company on the stamp, and then to take them to the secretary of the company to sign, and afterwards to post them.

The instrument in question was regularly, and in the course of their duty, made out by the prisoner and his fellow clerk, and was properly stamped and initialed by them, and was afterwards duly signed by the secretary.

The indorsement of *Thomas Thompson Cunliffe Lister*, the proprietor in whose favour the document was drawn, was forged after the document had been signed

by the secretary, and the prisoner uttered the document with the forged indorsement knowing it to be forged.

1857.

 AUTHEY'S
Case.

The following is a copy of the instrument and indorsement,

“ *Leeds, Bradford and Halifax Junction Railway Company's Offices, Great Northern Station, Bradford, 9th June, 1856.* ”

No. 338.

£13. 11s. 7d.

“ The *Leeds Banking Company, Leeds.* ”

Draft payable	on demand	or receipt
	L. B.	
	& H.	
one penny.		

Pay to *Thomas Thompson Cunliffe Lister* or order thirteen pounds eleven shillings and seven pence which charge to the Company's Revenue Account.

Martin Cawood,
Secretary.

“ The shareholder's name must be endorsed at the back of the check.”

(Indorsement) “ *T. T. Cunliffe Lister.* ”

It was proved at the trial that the bankers would not have paid the money mentioned in the order, even to the proprietor himself, without his indorsement.

I reserved the case for the opinion of the Court for the Consideration of Crown Cases Reserved, and the question is,

Whether the prisoner was properly convicted for uttering either a warrant for the payment of money or an order for the payment of money ?

CHARLES CROMPTON (a).

(a) The learned Judge referred to *Rea v. Arscott*, 6 Carr. & P. 408 ; 2 Russ. Crim. 514.

1857. This case was argued on 25th *April* 1857, before

AUTEY'S
Case.

COCKBURN C. J., COLERIDGE J., MARTIN B., CROMPTON J. and WILLES J.

J. B. Maule appeared for the Crown, and *Price* for the prisoner.

Price, for the prisoner. I submit that the evidence did not support the indictment, the allegations in which must be proved as laid. Where the charge is of forging some particular instrument, it must be shown that either the whole or some material part of such instrument has been forged, otherwise the charge should be confined to the part which was in fact forged. Here the prisoner is indicted in one count for uttering a warrant for payment of money, and in another count for uttering an order for payment of money. The part of the instrument which was in fact forged by the prisoner was the indorsement of the shareholder's or proprietor's name; and, it being essential to prove that some part of the instrument was forged which was necessary to its character as a warrant or order for payment of money, the proof failed because the instrument was an order for payment of money before the indorsement, and the indorsement added nothing to its nature and validity as such order. All that is essential to an order or warrant to pay money is that it should purport to be made by one having authority to order the payment, and that it should be upon one who is compellable to pay. The cases on this point were all considered in *Regina v. Vivian (a)*. The instrument therefore being an order before it was indorsed, the proof that the prisoner uttered the instrument with a forged indorsement is insufficient to convict him; and if, on the other hand, the instrument was not complete as an order before indorsement, the indictment should

(a) 1 Den. C. C. 35.

have been specially framed so as to charge a forgery of the indorsement.

1857.

 AUTHEY'S
Case.

COLERIDGE J.—The question is, whether this was a valid order before the indorsement was added. Suppose the words had been “Pay to *T. C. Lister*’s order,” and then his indorsement had been forged, would not that have been a forgery of an order to pay? This is not an order for payment of money till *T. C. Lister* has indorsed it.

Price. The form of the instrument, as set out, did not render it necessary that *Lister* should indorse it unless he wished some one else to get the money.

COLERIDGE J.—The indorsement was at all events an order to pay; it made the instrument an order to pay anybody,—to pay the bearer.

Price. The forgery of the indorsement did not give the instrument any validity as an order; it did not alter the legal nature of the instrument, which was a complete order to pay without it. The indorsement was nothing more than a receipt, which the shareholder was required to give the banker.

COCKBURN C. J.—It strikes me that it is a conditional order,—an order to pay on condition that the shareholder indorses his name at the back of the check.

COLERIDGE J.—Would the banking company have been justified in paying the money to any one, without *Lister*’s name at the back?

Price. Yes; to pay *Lister* himself.

CROMPTON J.—But for the condition as to the indorsement, it would be a bill of exchange.

Price. Then the indictment should so have described it.

CROMPTON J.—If the indorsement is part of the instrument, it was not a bill of exchange, nor was the authority to pay complete, until it was indorsed.

1857.

AUTEY'S
Case.

May not parties impose a condition upon an order or promise to pay, which will prevent it from being a bill of exchange or promissory note, but not prevent it from being an order or warrant to pay?

Price. No doubt such conditions are frequently imposed for the security of the bankers who are to pay; but the compliance with such a condition is not essential to give validity to the order. Take, for instance, the case of a crossed check. In *Rex v. Arscott* (a) it was decided that the forgery of an indorsement upon an order for payment of money, is not an offence within section 3 of 11 *Geo. 4 & 1 Wm. 4. c. 66.* *Bolland B.* in his judgment in that case said, "The section does not include in the offences enumerated the forging of an indorsement on an order for payment of money." And *Littledale J.* says, "The legislature has made no provision for forging an indorsement on any warrant or order."

COCKBURN C. J.—The effect of this instrument is, "Pay *Lister*, or order on *Lister* putting his name at the back;"—then, is it an order until that is done?

CROMPTON J.—Were it not for *Rex v. Arscott*, it might be doubted whether an indorsement upon an order, is not in itself an order. The statute expressly provides against the forgery of any bill of exchange, or of any indorsement of any bill of exchange; and it also provides against the forgery of any order, but not of any indorsement upon an order; and the Judges in *Rex v. Arscott* seem to have thought that, therefore, an indorsement upon an order was not within the meaning of the section.

COLERIDGE J.—That case does not decide that the forgery of an indorsement may not, under some circumstances, be a forgery of an order for the payment of money.

(a) 6 Car. & P. 408.

Price. Here the order is complete in itself, and the forgery being only a forgery of an indorsement upon the order, the statute does not apply. There is no alteration in the instrument itself; and that instrument is, without indorsement, an order drawn by a person who has a right to draw upon persons who were compellable to pay

1857.

AUTEY'S
Case.

COCKBURN C. J.—Were the bankers compellable to pay? Compellable by whom except by the drawer? Can you contend that if, without an indorsement, the bankers had refused to pay, they would have been liable to an action?

COLERIDGE J.—That which authorizes the bankers to pay, and to take credit for the payment, is the indorsement by Mr. *Lister*. Is not that indorsement the warrant?

Price. I contend that the indorsement is not the order, nor is it any part of the order; and the direction that the shareholder's name must be indorsed at the back of the check is merely saying to the bankers, "When this person presents the check, make him give a receipt." In *Regina v. Illidge (a)* a "tasting order" for wine from a wine merchant, which requires the signature of a clerk of the Dock Company before the person bringing it is allowed to taste, was held to be an order for the delivery of goods.

J. B. Maule, for the Crown. The instrument was not perfect as a warrant or order for payment of money till the indorsement was added. The fallacy which lies at the root of the argument on the part of the prisoner is, that this is, as the facts show, an indorsement upon an order; that is not so, for the forgery of the name of the shareholder is a forgery of a material part of the instrument itself. In *Regina v.*

(a) 1 Den. C. C. 404.

1857. *Atkinson (a)*, on an indictment for forging and uttering
 AUTEY'S "a warrant and order for the payment of money, to
 Case. wit a warrant and order for the payment of 85*l.*,"
 and for forging and uttering an "acquittance and receipt for money, to wit for 85*l.*," it was shown to be the custom of bankers to give receipts on the deposit of money in the following form:—"Received of *A. B.* 85*l.* to his credit. This receipt not transferable";—and to pay the money, with interest, on the return of the receipt with *A. B.*'s name written on it; and it was held that the forging the name of *A. B.* on the receipt, and receiving the amount due on its return, was a forgery and uttering an acquittance for the 85*l.* and interest. In the present case there was a forgery of a material part of the order, because there was no order for payment of the money until the indorsement was made; nor was there any person compellable to pay until the shareholder's name was indorsed; *Regina v. Vivian (b)*. This was not an order until such indorsement, and therefore the decision in *Rex v. Arscott (c)* does not apply.

CROMPTON J.—But is not this an instrument negotiable by indorsement within the meaning of *Little-dale J.*?

Maule. In *Rex v. Arscott* the forged instrument was described as an indorsement upon an order. That was not an offence within the statute; but here the instrument is properly described in the indictment in the words of the statute, and the evidence shows a forgery of a material part of that instrument, since the instrument itself had no virtue or value without the indorsement. This is not like the case of a crossed check, because the check is a valid and effectual instrument without the crossing; nor is it

(a) 2 Moo. C. C. 215; S. C. Car. & M. 325.

(b) 1 Den. C. C. 35.

(c) 6 Car. & P. 408.

like the indorsement of a bill of exchange, which is a perfect instrument in itself without such indorsement. But the instrument in this case bore no value, as far as obtaining money by means of it went, until it was indorsed,—until in fact it bore the signature of the shareholder as well as that of the secretary.

1857.

 AUTHEY'S
Case.

Price, in reply. If this was an instrument negotiable by indorsement within the meaning of *Little-dale J.* in *Rex v. Arscott*, it ought to have been so described in the indictment; or the instrument itself should have been set out, and then brought within the statute by proper averments.

COLERIDGE J.—When the prisoner uttered the instrument with the forged indorsement upon it, what was the character of the whole instrument more than that of an order for payment of money?

Price. It was an order for the payment of money with a forged indorsement or receipt thereon.

COLERIDGE J.—How was it an order when the party to whom it was addressed was not bound to pay? There is a prohibition not to pay until it is indorsed.

Price. That is merely an intimation that the shareholder will be required to indorse.

COLERIDGE J.—But is the banker compellable to pay without it?

COCKBURN C. J.—And if compellable, by whom?

Price. By the drawer.

COCKBURN C. J.—Then the drawer is answered by his own direction, which is, not to pay unless the shareholder's name is indorsed.

Price. If any condition is attached it is no longer a warrant or order to pay; and if it was a conditional order, it should have been so described.

CROMPTON J.—It may be said that the indorsement

1857.

AUTEY'S
Case.

is a mere compliance with a regulation, rather than an order by the shareholder upon the banker, whom he would have no right to order except in pursuance of the instrument.

Price. Suppose all the rest of the instrument to be forged, and only the signature on the back genuine, it would then be a forged order for the payment of money.

CROMPTON J.—But if two signatures are necessary to make it a perfect order, the forgery of either may be charged as the forgery of the entire document.

Price. But here the requiring an indorsement is a mere matter of convenient regulation. It is collateral to the order, which is quite perfect without it.

COCKBURN C. J.—The question is, is it a good and perfect order on the face of it, without the indorsement.

Cur. adv. vult.

The judgment of the Court was delivered on 22nd June 1857, by

CROMPTON J.—There appears to have been no authority to pay the money mentioned in the document in this case without the indorsement of the proprietor, and that indorsement may be considered as necessary to make the instrument in question a perfect order or warrant authorizing or requiring the payment. Whether the document be regarded as the warrant or order of the company upon their bankers, or whether it be regarded as the warrant or order of the proprietor to the bankers to pay out of the company's funds (made subject to his order to the amount specified in the instrument), it still is imperfect without the proprietor's indorsement, and contained neither an authority or request to pay without such indorsement.

We think therefore that the forging of the signature of the proprietor amounted to a forgery of the entire document, and that such document was properly described as a warrant or order for the payment of money, and that this conviction should be confirmed.

Conviction affirmed.

1857.

AUTEY'S
Case.

REGINA v. HARRIET GRAY.

1857.

THE following case was reserved on the *Norfolk* Spring Circuit 1857, at *Huntingdon*, by ERLE J., and stated by him for the consideration and decision of the Court of Criminal Appeal.

The indictment was for causing a bodily injury dangerous to life, to wit a congestion of the lungs and a congestion of the heart, with intent to murder. The verdict was guilty. The facts were these. The prisoner left her infant child on a cold wet day lying in an open field, intending that it should die, and it was found there after some hours nearly dead from the effects of such exposure, there being congestion of the lungs and the heart caused thereby, which would have been in a short time fatal if relief had not been given. At the time when the prisoner left the child lying in the field she had not caused any bodily injury to it, and in a few hours after the child had been found it was restored by care, and then there remained no bodily injury either to the lungs or heart, or other-

The prisoner was convicted upon an indictment, framed on section 2 of 7 Wm. 4 & 1 Vict. c. 85., for causing a bodily injury dangerous to life with intent to murder. It appeared that the prisoner, intending to cause the death of her infant child, exposed it in an open field on a cold wet day, and that it was found there after some hours nearly dead from congestion of the lungs and heart, which would shortly

have proved fatal if relief had not been given; but by care it was restored in a few hours so that no bodily injury remained. *Held*, that in order to sustain the indictment it was not enough to prove a mere temporary functional derangement, and that, there being no lesion of the organs of the child, the conviction was wrong.

1857.

GRAY'S
Case.

wise consequential from the exposure through congestion or otherwise. Judgment was respited, the prisoner remaining in custody till the opinion of this Court could be taken on the question, whether, on these facts, the conviction for causing a bodily injury dangerous to life was right.

W. ERLE.

This case was argued on 2nd *May*, 1857, before COCKBURN C. J., COLERIDGE J., CROWDER J., WILLES J. and BRAMWELL B.

Couch appeared for the Crown; no counsel appeared for the prisoner.

Couch, for the Crown. This indictment is under section 2 of 7 *Wm.* 4 & 1 *Vict.* c. 85, which enacts, that "whosoever shall administer to or cause to be taken by any person any poison or other destructive thing, or shall stab, cut or wound any person, or shall by any means whatsoever cause to any person any bodily injury dangerous to life, with intent, in any of the cases aforesaid, to commit murder shall be guilty of felony, and being convicted thereof shall suffer death." Now in this case the prisoner left her infant child in a field on a cold and wet day intending, as the jury found, that it should die. There was therefore the intent to murder, and the question is, whether the temporary injury to the child, by the congestion of the lungs and heart, was a "bodily injury dangerous to life" within the meaning of the statute. The learned Judge at the trial seemed to think that, to bring the case within the second section of the statute, the bodily injury must be of a like nature with the injuries previously mentioned in that section, namely, stabbing, cutting or wounding. But I submit the words upon which this indictment is framed constitute

an entirely distinct provision, and create an offence different to those previously mentioned.

1857.

 GRAY'S
Case.

COCKBURN C. J.—What bodily injury is there here?

Couch There is congestion of the lungs and heart which, if relief had not been given, would shortly have caused death. The intention of the legislature seems to have embraced every kind of attempt to murder, whatever the means employed, and therefore the words “or *by any means*” were introduced. If the child had been placed in an open field with the intent that it should die, and it had died in consequence, it would have been murder.

COLERIDGE J.—No doubt; but here, the child not having died, the question is, was there any bodily injury produced by the act of the prisoner? Suppose the child had been put into an exhausted receiver, but had been taken out before it had actually received any bodily injury, would that have been an offence within this section?

Couch. There is no bodily injury in the sense of a wound, but there is an internal injury, and it has been held that an internal wounding is within the section (a).

COCKBURN C. J.—Must it not be an injury to the organic structure to satisfy the statute? All that was produced in this case was a mere functional derangement. Congestion is the filling of the lungs and heart with more blood than there ought to be there. The offences created by the preceding words of this section are cases of injury to the bodily structure.

(a) In *Regina v. Smith*, 8 Car. & P. 173, a blow had been given with a hammer on the face which broke the lower jaw in two places; the skin was broken internally but not externally, and there was not much

blood; *Parke J.*, on consulting with Lord *Denman C. J.*, held the offence to come within the section in question in the principal case. See also *Regina v. Warman*, 1 Den. C. C. 183.

1857. The words "stab, cut or wound" all relate to some injury to the structure, some lesion of the body.

GRAY'S
Case.

CROWDER J.—But the section also relates to administering poison or other destructive thing.

COLERIDGE J.—I think the words, "or by any means cause bodily injury dangerous to life," were intended to meet cases of serious injury where no instrument is used, such as injuries by biting (*a*) or striking with the fist, which it had been decided were not within the meaning of previous statutes.

Couch. The Legislature, by using the most general words, appears to have intended to make their application as wide as possible.

COCKBURN C. J.—Must not the means be applied with intent to cause the particular injury sustained? It strikes me that this was an attempt to commit murder.

BRAMWELL B.—If the prisoner, intending to kill the child, had directed upon it a blast of cold air or a stream of water, and had thereby injured the child, would that have been within the statute? Is there any difference between that and exposing the child to the influence of the weather?

Couch. The prisoner in this case, placing her child in the open field, is the same as if she had directly applied the blast of cold air or the stream of water to the child intending to kill it thereby. The Legislature intended to include every bodily injury dangerous to life, if occasioned by that which was done with intent to murder; and I submit that this case comes within the evil intended to be remedied and within the meaning of the statute, and that the conviction is right.

Cur. adv. vult.

(*a*) *Rex v. Stevens*, 1 Moo. C. C. 409; *Rex v. Harris*, 7 Car. & P. 446.

The judgment of the Court was delivered on the 22nd June, 1857, by

1857.

 GRAY'S
Case.

COCKBURN C. J.—This case was argued before my brothers COLERIDGE, CROWDER, WILLES, BRAMWELL and myself on a point reserved by my brother ERLE, as to whether the prisoner, who had exposed her child, whereby temporary congestion of the lungs had taken place in the child, was liable to be indicted and convicted under the 7 Wm. 4 & 1 Vict. c. 85. s. 2. We are of opinion that the conviction in this case cannot be sustained. We think that, looking to the words of the act of Parliament and the other offences provided for by the second section of the 7 Wm. 4 & 1 Vict. c. 85., the condition of the child's organs not having been attended with any lesion, there was no bodily injury dangerous to life within the meaning of the statute. The conviction therefore must be quashed and the prisoner discharged.

Conviction quashed.

REGINA v. JOHN DANGER.

1857.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by the Recorder of *Bristol*.

The prisoner was convicted upon an indictment, founded upon section 53 of

7 & 8 Geo. 4. c. 29., for obtaining a valuable security by false pretences. The facts were, that the prisoner falsely represented to the prosecutor that a third person was baling up for him a quantity of leather which was to come into his warehouse that afternoon, and the prosecutor, relying on such false statement, at the request of the prisoner, agreed to purchase the leather and to accept a bill for the amount of the purchase money. The prisoner shortly afterwards produced and handed to the prosecutor a bill duly stamped, signed by himself as drawer, addressed to the prosecutor, and made payable to the prisoner's own order; and the prosecutor accepted the bill and returned it to the prisoner, who subsequently indorsed and negotiated it, and appropriated the proceeds to his own use. *Held*, that the conviction could not be supported, as the bill, whilst in the hands of the prosecutor, was of no value to him nor to anyone else unless to the prisoner; and as the prosecutor had no property in the bill as a security, or even in the paper on which it was written.

1857.

DANGER'S
Case.

The prisoner *John Danger* was tried before me at the Quarter Sessions of the peace in and for the city and county of *Bristol*, held on the 7th day of *April* in the year of our Lord one thousand eight hundred and fifty seven, on an indictment under the statute 7 & 8 *George* the 4th, cap. 29, section 53, for obtaining a valuable security by false pretences. The indictment contained two counts, a copy of which is annexed to this case (marked A.) The false pretences were proved as alleged in the indictment. It was also proved, that *Richard Latham*, the prosecutor, relying on such pretences, agreed to become the purchaser of a quantity of leather, called butts, of and from the prisoner *John Danger*, at the price of one hundred and eighty four pounds and sixteen shillings; that the prisoner then asked *Richard Latham* to accept a bill of exchange for the amount of the purchase money; that *Richard Latham* agreed to do so; that, soon after, the prisoner produced a bill of exchange duly stamped, signed by himself as drawer under the name of *John Danger & Co.*, payable to the drawer's own order, and addressed to *Richard Latham* for one hundred and eighty four pounds sixteen shillings, four months after date, and handed the same to *Richard Latham*; that *Richard Latham* accepted the bill by writing his name across it, and made it payable at Messrs. *Stuckey's Bank, Bristol*, and then delivered the same so accepted to the prisoner; that the prisoner took possession of the bill, and afterwards indorsed and discounted the same, and applied the proceeds to his own use. At the close of the case for the prosecution, it was objected by the prisoner's counsel that there was no evidence that the prisoner had obtained from *Richard Latham* a valuable security within the meaning of the statute 7th & 8th *George* 4th, cap. 29, section 53, so as to sustain either count of the indictment, on the ground that the evi-

dence showed that the prisoner had obtained from *Richard Latham* either an acceptance only or an instrument which was not an available security or of any value to *Richard Latham*. I refused, on this objection, to direct an acquittal, but left the case to the jury, who found the prisoner guilty; but I reserved the question for the opinion of the Court of Criminal Appeal, whether there was evidence that the prisoner obtained from *Richard Latham* a valuable security so as to sustain either count of the indictment. After the verdict it was objected, in arrest of judgment, that each count of the indictment was bad for not alleging that the valuable security obtained by *John Danger* was the property of *Richard Latham*, and the case of *Regina v. Sill*, Dearsly's Crown Cases, 132, was cited. I also reserved that question, and I have to request the opinion of the Court of Criminal Appeal upon the above matters. I postponed the sentence, and admitted the prisoner to bail until the next Quarter Sessions for the said city and county of *Bristol*.

John A. Kinglake,

Recorder of the city and county
of *Bristol*.

A.

City and County of *Bristol* } The jurors for our sovereign lady
to wit. } the Queen upon their oath present
that before and at the time of the
committing of the offence hereinafter named one
Richard Latham was a carrier carrying on business
at *Redcliff Street* in the parish of *Saint Mary Redcliff* in the city and county of *Bristol* and one *George Jenkins* was a tanner carrying on business at that
part of the parish of *Bedminster* which lies within the
city and county of *Bristol* and that *John Danger* late
of the parish of *Saint Nicholas* in the city and county
aforesaid leather factor on the 27th day of *December*

1857.

DANGER'S
Case.

1857. in the year of our Lord 1856 being an evil disposed
DANGER'S person and contriving and intending unlawfully fraud-
Case. ulently knowingly and designedly to cheat and defraud
then and there to wit on the day and year aforesaid
at the parish last aforesaid did ask the said *Richard Latham* if he the said *Richard Latham* would buy
some of *George Jenkins's*, (meaning the said *George Jenkins*) butts whereupon the said *Richard Latham*
then and there told the said *John Danger* that he the
said *Richard Latham* had been speaking to Mr. *Jenkins* (meaning the said *George Jenkins*) and he (mean-
ing the said *George Jenkins*) said he had no butts to
sell and the said *John Danger* thereupon unlawfully
knowingly and designedly did falsely pretend and
say to the said *Richard Latham* You (meaning the
said *Richard Latham*) don't know *George Jenkins*
(meaning the said *George Jenkins*) as well as I do for
he (meaning the said *George Jenkins*) is now baling
up three hundred butts for me (meaning himself the
said *John Danger*) to come into my warehouse (mean-
ing the warehouse of the said *John Danger*) this after-
noon and that he the said *Richard Latham* should have
them at the price of twenty one pence per pound and
that the said *Richard Latham* then and there agreed
to become the purchaser of to wit a certain part
of the said butts of and from the said *John Danger*
at that price whereupon the said *John Danger*
asked the said *Richard Latham* to accept a bill for
184*l.* 16*s.* and then and there produced a bill of
exchange drawn by him the said *John Danger* upon
him the said *Richard Latham* for the said sum of
184*l.* 16*s.* and the said *John Danger* then and there
stated to the said *Richard Latham* that he the said
Richard Latham should have the worth of it (meaning
the said bill of exchange for 184*l.* 16*s.*) in these butts
(meaning the said butts which the said *John Danger*
had as aforesaid unlawfully knowingly and designedly

falsely pretended and said that the said *George Jenkins* was baling up for him the said *John Danger* and which said butts were to come into his the said *John Danger's* warehouse that afternoon). By which said false pretence he the said *John Danger* on the day and year aforesaid at the parish of *Saint Nicholas* in the city and county aforesaid did unlawfully obtain from the said *Richard Latham* a certain valuable security to wit the said bill of exchange which the said *John Danger* had so drawn upon the said *Richard Latham* as aforesaid and which the said *Richard Latham* then and there accepted for the said sum of 184*l.* 16*s.* and of the value of 184*l.* 16*s.* with intent to cheat and defraud. Whereas in truth and in fact the said *George Jenkins* was not on the said 27th day of *December* in the year of our Lord 1856 in the possession of three hundred butts or any butts the property of the said *John Danger* nor was the said *George Jenkins* on the said 27th day of *December* 1856 baling up three hundred butts or any butts for the said *John Danger*, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

1857.

DANGER'S
Case.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *John Danger* on the day and year aforesaid in the parish of *Saint Nicholas* in the city and county aforesaid unlawfully knowingly and designedly did falsely pretend to the said *Richard Latham* that one *George Jenkins* had sold to and was then baling up for him the said *John Danger* three hundred butts of leather and which the said *John Danger* then and there unlawfully knowingly and designedly falsely pretended and stated to the said *Richard Latham* were to come into his the said *John Danger's* warehouse on the afternoon of the said day and that he the said *John Danger*

1857. DANGER'S
Case. could and would then sell the same or any part thereof to the said *Richard Latham* at a certain price to wit the price of twenty one pence per pound. By means of which said false pretences the said *John Danger* did then and there unlawfully obtain from the said *Richard Latham* a certain valuable security to wit a bill of exchange for the sum of 184*l.* 16*s.* and of the value of 184*l.* 16*s.* of and from the said *Richard Latham* as and for the sum to be paid by him in payment for certain of the said three hundred butts aforesaid with intent then and there to cheat and defraud the said *Richard Latham* of the same. Whereas in truth and in fact the said *George Jenkins* had not sold to the said *John Danger* nor was the said *George Jenkins* then baling up for him the said *John Danger* three hundred butts of leather or any butts of leather whatsoever nor were the said three hundred butts of leather to come into his the said *John Danger*'s warehouse on the afternoon of the said day nor could the said *John Danger* then sell the same or any part thereof to the said *Richard Latham*, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

This case was argued, on 30th *May* 1857, before Lord CAMPBELL C. J., ERLE J., WILLIAMS J., CROWDER J. and BRAMWELL B.

H. T. Cole appeared for the Crown, and *C. G. Prideaux* for the prisoner.

C. G. Prideaux, for the prisoner. First, the indictment is bad in arrest of judgment. The second count is not distinguishable from those in *Sill v. The Queen in Error* (a); it will only be necessary therefore to consider the first, which is open to the same objection; and is, I contend, also bad, because it does not

(a) Dears. C. C. 132; S. C. 1 Ell. & Bl. 553.

allege the valuable security to have been the property of the prosecutor. This defect is clearly fatal; *Regina v. Martin (a)*, *Regina v. Parker (b)* and *Sill v. The Queen in Error (c)*.

1857.

DANGER'S
Case.

LORD CAMPBELL C. J.—There has been no subsequent statute altering the law.

Prideaux. No. The case of *Sill v. The Queen* was decided after the passing of the 14 & 15 Vict. c. 100, and it was held that the defect was not a formal one, and was not cured by that statute.

Secondly. The evidence does not disclose any offence within section 53 of 7 & 8 Geo. 4. c. 29. First, I contend that upon the facts proved the bill never was the property of the prosecutor, and never was in his possession; and secondly, I submit that it was not a valuable security within the meaning of the statute.

ERLE J.—The same question is raised upon the merits and upon the indictment, as the facts are correctly stated in the first count.

Prideaux. Yes. The paper on which the bill was written was the property of the prisoner—the stamp was his—and no property was acquired by the prosecutor by reason of his writing his name as acceptor. The bill was handed to the prosecutor merely for the purpose of his so writing his name, and when that was done the property and right of possession were in the prisoner, and the prosecutor had no right to detain it. When the acceptance is complete the bill becomes the property of the drawer, even if not so before, and if the acceptor improperly detains the bill in his hands after acceptance, the drawer may nevertheless sue him on it and give him notice to produce it, or on his default give parol evidence of it; *Smith v. M'Clure (d)*. That case goes almost the whole length of supporting

(a) 8 Ad. & E. 481.

1 Ell. & Bl. 553.

(b) 3 Q. B. Rep. 292.

(d) 5 East, 475.

(c) Dears. C. C. 132; S. C.

1857.
DANGER'S
Case.

my position. In *Johnson v. Windle* (a) a promissory note delivered by defendant to plaintiff, payable to the plaintiff's order, was stolen from plaintiff by his clerk, who, after forging plaintiff's indorsement, obtained payment of the defendant's banker, and the banker handed the note to the defendant; and the Court held that the plaintiff was entitled to recover the amount at the hands of the defendant in an action of trover, notwithstanding six weeks had elapsed before the plaintiff discovered and gave the defendant notice of the loss of the note. I refer to this case mainly to call attention to the language of *Bosanquet J.*, who said, "This instrument on the face of it was marked as the property of the plaintiff." So in this case, the bill when accepted was marked as the property of the prisoner, and the prosecutor had no property therein.

In *Morrison and Gray v. Buchanan* (b), by the negligence of a clerk of the drawer of a bill, it was delivered out by a banker after acceptance to a wrong person; and *Littledale J.* held, that under those circumstances the drawer could not maintain trover for the bill against the party who so delivered it out; but it was not disputed that the bill was, after acceptance, the property of the drawer; and although in *Evans v. Kymer* (c) the property in a bill was held to be in the acceptor, the ground of the decision was that the bill had been deposited with the drawer to hold for the acceptor's use.

Here the prosecutor never had such a possession of the bill as would have enabled him to maintain trespass. All the cases show that *de facto* possession is not sufficient. In *Regina v. John Smith* (d), the prisoner having led the prosecutor to believe that he was about to pay him a debt due to him from a third

(a) 3 Bing. N. C. 225.

(c) 1 B. & Ad. 528.

(b) 6 Car. & P. 18.

(d) 2 Den. C. C. 449.

person, took out of his pocket a piece of blank paper stamped with a sixpenny stamp and put it upon the table, and then took out some silver in his hand, and mentioned the amount for which the prosecutor was to give a receipt. The prosecutor wrote and signed a receipt for that sum on the stamped paper, and the prisoner then took it up and went out and never paid the money; and the Court held, that the prisoner could not be convicted of larceny, because the prosecutor never had such a possession of the paper as would have enabled him to maintain trespass. It seems impossible in principle to distinguish that from the present case; and the reasons given by *Parke B.* apply equally here. His Lordship said, "The stamped paper never was in the prosecutor's possession, and the prisoner cannot be convicted of stealing it, unless the prosecutor had such a possession of it as would enable him to maintain trespass. It was merely handed over for him to write upon it."

1857.

DANGER'S
Case.

BRAMWELL B.—If the prosecutor, after he had written the acceptance, had discovered the fraud and refused to part with it, and the prisoner had snatched it away from him, could the prosecutor have maintained trespass?

Prideaux. No. I apprehend he could not.

LORD CAMPBELL C. J.—Suppose the prosecutor, having discovered the fraud, had refused to deliver the acceptance to the prisoner, and the prisoner had brought detainee to recover it, would not the prosecutor have had a good defence?

WILLIAMS J.—Under such circumstances would not the prosecutor, at all events, have had a right to retain the acceptance till he had erased his name from it?

ERLE J.—Suppose the prosecutor, after having written the acceptance had put the instrument away till the following day, and in the meantime received information of the fraud, which would have induced

1857.

DANGER'S
Case.

him to cancel it; but the drawer, during the interval, stole it? As at present advised, I think the drawer might be indicted for larceny.

Prideaux. There are two cases, referred to in *Regina v. John Smith*, which also appear in point. One is *Rex v. Minter Hart (a)*, where the prosecutor was, by fraud, induced to write acceptances upon ten blank bill stamps provided by the prisoner, which were afterwards filled up by him as bills for 500*l.* each, and put into circulation; and it was held that a charge of larceny against the prisoner for stealing the stamps, and for stealing the paper on which the stamps were, could not be sustained, because the prosecutor never had either the property or the possession of the papers so as to make the taking of them by the prisoner a larceny. In that case, as here, there had been a *de facto* possession by the prosecutor, but no such possession as would have enabled him to maintain trespass against the prisoner for taking the bills.

Lord CAMPBELL C. J.—Could not the prosecutor in this case have maintained trespass against a stranger who had taken the bill?

Prideaux. Possibly he might against a stranger; but not against the prisoner. In *Mrs. Phipoe's case (b)*, where the prosecutor was compelled by duress of his person to sign a promissory note previously prepared by the defendant, who produced it for the purpose, and took it away as soon as it was signed, it was held that the case was not within section 3 of 2 *Geo. 2. c. 25.*, because the instrument was of no value to the prosecutor, and because the note never was the property nor in the possession of the prosecutor.

Thirdly. The instrument was not a valuable security within the meaning of the statute.

(a) 6 Car. & P. 106.

P. C. 599; and see *Rex v. Edwards*,

(b) 2 Leach, C. C. 643; 2 East,

6 Car. & P. 521.

Some of the cases previously referred to are also important on this point. In *Minter Hart's case* it was decided that the stamps filled up, as before mentioned, were neither bills of exchange, orders for the payment of money, nor securities for money; and in *Mrs. Phipoe's case* the promissory note, which the prosecutor was compelled by duress to sign, was held to be of no value while in the hands of the prosecutor. In order to make the instrument a valuable security within the meaning of the statute, it must be effectual as a security when obtained—in other words it must at that time be of value to some person other than the prisoner.

The bill was not a valuable security while in the hands of the prosecutor, because the acceptance was not complete until delivery. This is settled by *Cox v. Troy (a)*, where the defendant, having written his acceptance with the intention of accepting a bill, afterwards changed his mind, and before communicating to the holder or delivering the bill back to him, obliterated his acceptance, and it was held that he was not bound as acceptor.

LORD CAMPBELL C. J.—There must be either a delivery or a communication to bind the acceptor.

ERLE J.—The *animus accipiendi* notified.

LORD CAMPBELL C. J.—Was not that done when the prosecutor, in the presence of the prisoner, wrote his name with the intention of accepting the bill?

BRAMWELL B.—In the ordinary course of banking business a bill is left at the bank for acceptance for twenty-four hours; but there many considerations may intervene which do not take place here, where the prisoner and the prosecutor are together in the presence of the paper.

1857.

DANGER'S
Case.

(a) 5 B. & Ald. 474.

1857.

DANGER'S
Case.

Prideaux. The prisoner had all the time an absolute property in the bill ; neither the indictment nor the evidence shows an unqualified acceptance until the delivery of the bill.

The bill being of no value to the prosecutor was of no value to any person other than the prisoner at the time when it was obtained ; because until indorsed it could not be of value to any one except the prisoner himself.

In *Minter Hart's case*, as here, there was no doubt a gross fraud had been committed ; but the Court held that they must look at the document as it was when obtained by the prisoner, and must see whether at the time when obtained it was a valuable security. In *Downe v. Richardson (a)*, it was held that an accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law.

CROWDER J. referred to *Stoessiger v. The South Eastern Railway Company (b)*.

Prideaux. There *C.*, being indebted to *G.*, framed a document directed to himself ordering himself, three months after date, to "pay to my order" the amount. The document had the stamp proper for a bill of exchange of that amount and length of time, and was in all respects like a bill of exchange, except that there was no drawer's name. *C.* wrote on it his acceptance, and caused it to be forwarded, in a parcel directed to *G.*, by a common carrier, in order that *G.* might add his name as drawer ; and, in an action against the carrier, it was held that the instrument was not at the time of its delivery to the carrier a bill, order, note, security for payment of money, nor writing of any value.

The prisoner, in this case, obtained no security of

(a) 5 B. & Ald. 674.

(b) 3 Ell. & Bl. 549.

value to the prosecutor. He drew his bill of exchange and delivered it to the prosecutor, and the prosecutor by acceptance and delivery, promised to pay it; and thus, according to the custom of merchants, it became the property of the prisoner, if not so before. Every thing previously to the delivery was the prisoner's, except the promise to pay; and a promise to pay is not the subject of larceny. Before the statute 1 & 2 Geo. 4. c. 78. s. 2., it was not necessary that the acceptances of an inland bill should be in writing; an acceptance by parol was sufficient at common law.

LORD CAMPBELL C. J.—A promise to pay is something not material, it is something aerial; but here you have the written acceptance.

ERLE J.—In every valuable instrument the value lies in the words apart from the ink with which they are written.

Prideaux. Abstracting from the bill the promise to pay, all that was material was the ink and the paper, and they unquestionably belonged to the prisoner.

BRAMWELL B.—You say the chattel belonged to the prisoner, and that all he got was the evidence of the promise.

Prideaux. And independently of that, the moment it was an acceptance it became the property of the prisoner according to the custom of merchants; and that, the only person to whom the bill could be of the slightest value being the prisoner himself, it was in fact of no value to him, because, by reason of his fraud, he could not have maintained an action upon it.

I, therefore, contend; first, that the indictment is bad in arrest of judgment.

LORD CAMPBELL C. J.—The indictment gives a full, faithful and complete history of the whole transaction.

1857.

DANGER'S
Case.

1857.

DANGER'S
Case.

Prideaux. It does. Secondly, I contend that the prosecutor had no sufficient property in or possession of the instrument; and thirdly, that it was not a valuable security within the meaning of the statute. It was of no value while in the hands of the prosecutor; when it got into the hands of the prisoner it was of no value, not being indorsed to any person, except to the prisoner himself; and in fact it was of no value to him, because of the fraud. I submit, therefore, that, both upon the indictment and upon the facts, I am entitled to your judgment.

H. T. Cole, for the Crown. First, the prosecutor had a sufficient qualified property in the bill at the time when it was obtained by the prisoner. He had such a possession of it as would have enabled him to maintain trespass. The prisoner presented a piece of stamped paper to the prosecutor, it was not a bill till accepted.

Lord CAMPBELL C. J.—It was an unaccepted bill.

Cole. After signing it the prosecutor might, if he had chosen, have erased his acceptance.

Lord CAMPBELL C. J.—You say he had a right of possession for that purpose. If the prisoner had taken the bill from the prosecutor *malo animo*, with the intention of preventing him from erasing his acceptance, would that have been a larceny?

WILLIAMS J.—It would be difficult to say so, if *Regina v. Smith* was well decided.

BRAMWELL B.—You argue that the prosecutor had a right of possession because he had a right of cancellation; but they are not identical. You cannot say that because he had a right of cancellation he had a right of possession.

Cole. *Evans v. Kymer* shows that if the prosecutor, after accepting the bill, had delivered it to the prisoner to hold for him, he might have maintained trover for it.

Secondly. The objection that the instrument was not a valuable security will not be maintained, if the Court can see that in any way it can be so regarded ; and I contend that it is quite sufficient if the acceptance was valuable to the prisoner ; and no doubt it was, for by indorsing it away, he obtained money upon it. In *Regina v. Boulton (a)*, it was held that a railway ticket, entitling a passenger to travel on the line of railway, was a chattel of value ; although the ticket was not of value to the person from whom it was obtained, but only to the person obtaining it.

1857.

DANGER'S
Case.

WILLIAMS J.—It was decided that it was a “chattel.”

Cole. Section 5 of the statute gives the rule of interpretation, which is, that “each of the several documents hereinbefore enumerated shall throughout this act be deemed for every purpose to be included under and denoted by the words ‘valuable security.’” The documents before enumerated include any “bill, note, warrant, order, or other security whatsoever, for money or for the payment of money ;” and I submit that the instrument in this case clearly comes within this definition of a valuable security. *Regina v. Smith (b)* was not the case of a valuable security, but of a receipt. In *Regina v. Greenhalgh (c)* an order upon the treasurer of a burial society, for payment of money to bearer, was obtained by the prisoner from the president by a false pretence that a death had occurred, and that order was held to be a valuable security within section 53, as explained by section 5 of the statute ; although there the order was of no value to the person from whom it was obtained. That decision, I submit, entirely cuts away this branch of the argument for the prisoner. With regard to the indictment, the whole facts appear upon it.

(a) 1 Den. C. C. 508.

(b) 2 Den. C. C. 449.

(c) Dears. C. C. 267.

1857.

DANGER'S
Case.

Lord CAMPBELL C. J.—If the offence be indictable, of which I give no opinion, I think the first count is sufficient.

Cole. The rule of law as to what constitutes a complete acceptance, is thus laid down in *Byles on Bills* (a):—"The liability of the acceptor, though irrevocable when complete, does not attach by merely writing his name, but upon the subsequent delivery of the bill or upon communication to some person interested in the bill that it has been so accepted." Here the latter alternative is satisfied, and the acceptance was clearly complete before delivery, the prosecutor having written the acceptance in the presence of the prisoner, and thereby communicated it to the person interested, namely, to the prisoner; and the bill was therefore a valuable security when in the hands of the prosecutor.

I therefore contend; first, that the prosecutor had a sufficient qualified property in and possession of the bill to support the indictment: secondly, that in order to make the instrument a valuable security within the meaning of the statute, it is sufficient if it be of value to the person obtaining it; in other words, if you obtain an acceptance from me, which is of value to you, you obtain a valuable security.

Prideaux, in reply. The result of the doctrine laid down in the passage cited from *Byles on Bills* is thus stated by the learned author (a): "Hence it follows that if the drawer has written his name on the bill with the intention to accept, he is at liberty to cancel his acceptance at any time before the bill is delivered, or at least before the fact of acceptance is communicated to the holder." But, assuming that the acceptance was complete as contended, the bill

(a) 7th Edition, p. 167.

thereupon became the property of the prisoner, even if not so before. *Regina v. Boulton* (a) does not apply; since, in that case, the decision was simply that a printed ticket of the railway company was a chattel within the meaning of the statute.

1857.

DANGER'S
Case.

In *Regina v. Greenhalgh* the order was payable to bearer, and was therefore a valuable security to any person into whose hands it came; but here the instrument was of no value to any one except to the prisoner, although it might, after indorsement, become valuable to other persons. The question is, Was it a valuable security to any person other than the prisoner when obtained? *Rex v. Pooley* (b), *Rex v. Clark* (c), *Rex v. Bingley* (d), *Rex v. Vyse* (e), *Regina v. Perry* (f).

When a man delivers a bill of exchange to the drawee for the purpose of being accepted, the drawee holds it for that purpose alone, and this does not in any way change the property in the bill; nor does it prevent the drawer, where there are no other parties to the bill, from demanding it back if he chooses; and, if left at a bank for acceptance, there is nothing to prevent him from demanding it even within the twenty-four hours allowed for acceptance.

Cur. adv. vult.

The judgment of the Court was delivered, on 18th June 1857, by

LORD CAMPBELL C. J.—We are of opinion that the offence charged and proved in this case does not come within 7 & 8 Geo. 4. c. 29. s. 53. The “chattel, money, or valuable security,” the obtaining of which by a false pretence may be made the subject of an indictment within this statute, must, we conceive,

(a) 1 Den. C. C. 508.

(b) Russ. & Ry. 12.

(c) Ibid, 181.

(d) 5 Car. & P. 602.

(e) 1 Moo. C. C. 218.

(f) 1 Den. C. C. 69.

1857.

DANGER'S
Case.

have been the property of some one other than the prisoner. Here there is great difficulty in saying that, as against the prisoner, the prosecutor had any property in the document as a security, or even in the paper on which the acceptance was written. In no one else could the property be laid. We should not have given weight to the argument that, even in the prisoner's hands, it was not a valuable security by reason of the fraud which would prevent him from enforcing it, but we apprehend that, to support the indictment, the document must have been a valuable security while in the hands of the prosecutor. While it was in the hands of the prosecutor it was of no value to him, nor to any one else unless to the prisoner. In obtaining it the prisoner was guilty of a gross fraud; but we think not of a fraud contemplated by this act of Parliament.

Judgment reversed.

1857.

REGINA v. GEORGE CRYER.

The prisoner was tried in *Wiltshire*, and convicted upon an indictment charging him with receiving the half of a bank note, knowing it to have been stolen.

THE following case was reserved and stated for the consideration and decision of the Court of Criminal Appeal by WILLIAMS J.

George Cryer was convicted before me at the last Assizes at *Salisbury* for receiving the half of a 5*l.* note, knowing it to have been stolen. The question I have reserved for the consideration of the Court of

The only evidence of any receipt or possession by the prisoner, in *Wiltshire*, was that the half note, which had been stolen during its transit through the post-office from *S.*, in *Wiltshire*, to *Bristol*, was afterwards inclosed by the prisoner in a letter, posted by him in *Somersetshire*, and addressed to the bankers at *S.*, requesting payment of it; and that that letter arrived with its contents in due course at *S.* Held, that as the possession of the post-office servants or of the bankers in *Wiltshire* was the possession of the prisoner, he was properly tried in *Wiltshire*, and the conviction was right.

Criminal Appeal is, whether there was any jurisdiction to try him in the county of *Wilts*?

1857.

 CRYER'S
Case.

The facts were that the note in question had been issued by the country bank at *Swindon* in *Wiltshire*. The one half of the note had been sent by post from *Swindon* by a tradesman there to his correspondents in *Bristol*, and duly received by them. The other half was put by him into a letter, which was posted at *Swindon*, but it was stolen in its transit by some person and in some way unknown.

There was sufficient proof that the prisoner had received the stolen half of the note with a guilty knowledge, and that he had inclosed it in a letter to the bank at *Swindon* requesting payment of it, which he had put into the post office at *Bath*, and which arrived with its contents in due course at *Swindon*; but there was no evidence that the stolen half of the note was received by the prisoner in *Wiltshire*, or was ever in his possession in that county, unless, as it was contended on behalf of the prosecution, the bankers at *Swindon* to whom the stolen half note had been remitted, or the post office servants in the county, can be regarded as his agents for transmitting the stolen property, and their possession in the county of *Wilts* can be treated as his possession.

EDW. VAUGHAN WILLIAMS,
April 23, 1857.

This case was considered on 25th *April*, 1857, by COCKBURN C. J., COLERIDGE J., WILLIAMS J., MARTIN B., CROMPTON J. and WILLES J.

No counsel appeared.

Cur. adv. vult.

The judgment of the Court was delivered, on 23rd *June*, 1857, by

1857.

CRYER'S
Case.

COCKBURN C. J.—We think that the conviction was right. Even at common law the venue would, perhaps, be proper, treating the receiver as an accessory after the fact, and supposing him to have dealt with the stolen note personally, or by his agent in *Wiltshire*, by handing it to the bankers in that county to get it changed. But the statute 7 & 8 *Geo.* 4. c. 29. s. 56. expressly enacts that a receiver of stolen goods may be tried in any county in which he shall have had the stolen property in his possession.

The question then appears to be, simply, whether the possession of the post office servants, or that of the banker who received it in *Wiltshire* by means of the prisoner and for his purposes, can be regarded as his possession, and we think that it can. It is plain that if he had employed a private agent to give it to the banker in order to get it cashed, the possession, in point of law, would all along have remained in the prisoner; and why should it the less because it is transmitted through a public agent by means and on behalf of the prisoner? In accordance with this view is that taken in *Regina v. Jones (a)*.

Conviction affirmed.

(a) 1 Den. C. C. 551.

1857.

REGINA v. JOHN LEWIS.

The Judge
who tries a
prisoner
has power,

THIS case was tried before MARTIN B. at *Liverpool*, when a case was reserved for the opinion of the Court under section 22 of statute 7 *Geo.* 4. c. 64., to allow the costs of the prosecution on the hearing of a case reserved for the Court for Consideration of Crown Cases; and the officer of that Court will tax and ascertain such costs, and certify the amount to the officer of the Court below.

for the Consideration of Crown Cases Reserved, in 1857.
 which Court the case was heard and decided on

LEWIS'S
 5th April, 1857 (a). Case.

On the 14th November, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., MARTIN B. and CHANNELL B.,

Brett made an application as to the costs incurred by the prosecutor in causing the case to be argued by counsel in this Court. On the trial of the prisoner at *Liverpool* the Judge made the usual order for the costs of the prosecution; nothing being said about the costs to be incurred in this Court; but it was now contended that such order included the costs in this Court unless they were expressly excluded, and it was stated that MARTIN B. was at all events ready now to say that the costs ought to be paid. On application being, at the subsequent assizes, made to the taxing officers to tax the costs incurred in this Court, they refused to do so, and referred the parties to the officer of this Court. The question was who was the proper person to tax the costs, the officers of the Court below or the officer of this Court.

COCKBURN C. J.—It is no part of the duty of the officer of this Court.

Brett referred to 7 *Geo.* 4. c. 64. s. 22., which he argued gave power to this Court to allow the costs, or at all events to the Judge at the trial. If it was for the Judge at the trial to allow the costs, his allowance of them generally in the usual form would include the costs of the case which he thought fit to reserve. He referred also to 5 & 6 *Wm.* 4. c. 76. s. 114.; 11 & 12 *Vict.* c. 78.; Reg. Gen. *Trinity* Term, 13 *Vict.* (b), *Regina v. Cluderoy* (c), *Regina v. Dolan* (d), *Regina*

(a) See Report, *antè*, p. 182.

(b) 1 Den. C. C. Preface ix.

(c) 3 Car. & Kir. 205.

(d) Dears. C. C. 436.

1857.

LEWIS'S
Case.

v. Newhouse (a), Regina v. Woolley (b), Regina v. Hornsea (c). Convenience required that the costs should be taxed by an officer of the Court in which they were incurred.

COCKBURN C. J.—We think this Court has no power to make an order for the costs incurred in this Court; but that under 7 *Geo. 4. c. 64.*, the Judge who reserves the case may, at the time, allow the costs to be incurred in this Court as well as the other costs of the prosecution. We think it would be convenient that the officer of this Court should examine into costs incurred in this Court; and, although his certificate cannot, in law, bind the taxing officer below, yet we have no doubt those officers will accept and consider as binding the certificate of the experienced officer of this Court. We have power to make rules for the practice of this Court, and we will consider the terms of a rule, which we will make, as to the mode in which our officer shall allow or disallow the costs incurred in this Court (*d*).

(a) 22 L. J. Q. B. 127.

(b) 4 Cox C. C. 452.

(c) Dears. C. C. 291.

(d) The following is the entry as to this application in the Minute Book of the Court for the Consideration of Crown Cases Reserved:—

“This case having been reserved for the consideration of this Court from Mr. Baron MARTIN last *Trinity* Term, it is now stated by *Brett*, counsel for the Crown, that the Court at which the trial took place had made the usual order for the costs of the prosecution to be allowed under the 7th *Geo. 4. c. 64.*; that after the determination of the case application had been made to the clerk of the Crown for *Lancaster* to tax and allow the

costs incurred here, but that he had refused to do so on the ground that he was not the proper officer for that purpose within the meaning of the statute in that behalf. He also stated that the officer of this Court was willing to tax these costs, and that for the purpose of uniformity it was desirable there should be one taxing officer instead of many, which would be the case if the amount of costs of prosecution incurred in arguing cases here were to be left to the several clerks of assize and of the peace; and he prayed that the officer of this Court might be instructed touching the matter.

COCKBURN C. J. said, that as their officer did not object, and it appeared the public convenience

would be served by such a course of practice it would be desirable for the future that the costs incurred here should be ascertained and taxed (for the purposes of 7 Geo. 4. c. 64.) by the officer of this Court, and for the like purpose they should be certified by him to the officers of the Courts below, and he doubted not those officers would give full effect to

such certificate, and that, if necessary, this Court would make a rule for establishing such a course of practice."

Probably it will not be found necessary to make any rule on the subject, as the practice will no doubt in future be in accordance with the expressed opinion of the Court.

1857.

LEWIS'S
Case.

Lough v. 12/7/90

REGINA v. WILLIAM DRING and MARY

1857.

his Wife.

Sb. 7 Case 382

THE following case was reserved and stated by the Chairman of the Nottinghamshire Sessions, held at Newark.

At the last Nottinghamshire Quarter Sessions, held at Newark, William Dring and Mary Ann his wife were jointly indicted for feloniously stealing, on the 22nd of February last, at South Collingham, ten pecks of potatoes of the value of 7s., and two sack bags of the value of 3s., of the goods of Richard Wallhead. A second count in the indictment charged the prisoners jointly with receiving the said potatoes and sack bags, they well knowing the same to have been feloniously stolen. They both pleaded not guilty. The jury found both the prisoners guilty on the second count, and that Mary Ann Dring received the potatoes and bags without the controul or knowledge of and apart from her husband William Dring,

The two prisoners, husband and wife, were jointly indicted for receiving goods knowing them to have been stolen. The jury found both the prisoners guilty, and that the wife received the goods without the controul or knowledge of and apart from her husband, and that he afterwards adopted his wife's receipt. Held that, upon this

finding, the conviction of the husband could not be sustained.

Query, whether section 14 of 14 & 15 Vict. c. 100. applies to successive receipts of the same goods by different receivers.

1857.

 DRING'S
 Case.

and that *William Dring* afterwards adopted his wife's receipt. The prisoners' counsel contended that this verdict amounted in law to an acquittal of both prisoners. The Court thought otherwise, but deferred judgment, and discharged the prisoners on recognizance to appear at the next sessions to receive judgment, and reserved the case for the opinion of the Court of Crown Cases Reserved, whether under the circumstances the verdict, as against either or both of the prisoners, was wrong.

J. Evelyn Denison,

21st May, 1857.

Chairman.

This case was argued on 14th November, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., MARTIN B. and CHANNELL B.

Bell appeared for the prisoners. No counsel appeared for the Crown.

Bell, for the prisoners. It cannot be contended that the conviction of the wife was wrong; but upon this finding of the jury, which is in the nature of a special verdict, the conviction of the husband cannot be sustained. This is a joint indictment; but the finding of the jury negatives a joint receipt, and, therefore, previously to the passing of the statute 14 & 15 Vict. c. 100., both the prisoners could not have been found guilty (a). By section 14 of that statute it is enacted, that "if upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property." This

(a) *Rex v. Messingham*, 1 Moo. C. C. 257; *Regina v. Matthews*, 1 Den. C. C. 596; *Regina v. Dovey and Gray*, 2 Den. C. C. 86.

section would seem to apply to cases where different receivers separately receive different parts of the stolen property ; but even assuming it to apply to successive receipts of the whole, there is here no finding of any receipt by the husband after the receipt by the wife. The jury find that the first receipt was by the wife, and that that receipt was without the controul or knowledge of the husband. The receiving by the wife was then complete, and her husband could not adopt her felonious act so as to make it his own.

MARTIN B.—What is the meaning of “ afterwards adopted his wife’s receipt.” Is it that he ate some of the potatoes ?

Bell. There certainly was no evidence of that.

MARTIN B.—A man is said to adopt an act when it has been done for him, or by his previous authority, and he afterwards recognises it.

WILLIAMS J.—The case states that the jury found both the prisoners guilty.

Bell. But that is explained by what follows, and which must be treated as a special verdict, and as explaining what the jury meant by that finding. To support the conviction of the husband there must be an express finding by the jury of a separate and distinct receipt by him from his wife ; and there is no such finding.

COCKBURN C. J. — We are of opinion that the conviction, as against the male prisoner, cannot be sustained. Even assuming, which in the view we take of the case it is not necessary we should, that the recent statute applies to a case like the present, and would authorize a separate conviction upon a joint indictment where there are two distinct acts of receiving the whole of the goods, still we think the facts do not warrant the conviction of the husband. If we are to take it that the jury meant to say, We

1857.

 DRING'S
Case.

1857. find the prisoner guilty if this Court should be of opinion that upon the facts we are right, then we ought to be able to see that the prisoner took some active part in the matter; that the wife first received the goods, and then the husband from her; both with a guilty knowledge. Whether the statute would then apply it is not necessary now to decide; for the reasonable construction of the case is that the jury have said, We find him guilty if this Court should be of opinion that that finding is right. The word "adopted" may mean that the husband passively consented to what his wife had done, without taking any active part in the matter; and in that case we think it would not be right to say that he was guilty of receiving. True it may mean that he did take such active part, but we cannot put this rigid construction upon the word "adopted;" and it would be going too far to say, upon this finding of the jury, that the conviction can be supported.

The other learned Judges concurred.

Conviction of the male prisoner quashed.

1 Moody & Rof 15

1857.

REGINA v. GEORGE LIGHT.

The defendant was convicted upon an indictment charging him with

THE following case was reserved and stated by the Chairman of the Quarter Sessions for the western division of the county of *Sussex*.

assaulting a constable in the execution of his duty. It appeared that the constable whilst standing outside the defendant's house saw him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open;" that in about twenty minutes afterwards the defendant left his house, after saying that he would leave his wife altogether, and was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence; and that upon being so taken into custody the defendant resisted and assaulted the constable. *Held*, that the constable was justified in apprehending the defendant, and that the conviction was right.

At the Quarter Sessions for the western division of the county of *Sussex*, holden at *Horsham* on the 1st *July* 1857, *George Light* was tried for an assault upon *George Cross*, an officer of the *West Sussex* Police, *Cross* being then in the due execution of his duty. The verdict was guilty.

1857.

LIGHT'S
Case.

The facts are : *George Light*, the defendant, is a married man, and, with his wife and three children, lives in a cottage at a place called *Patfield*, adjoining to the city of *Chichester*. On the night of the 14th of *May* last, a few minutes before eleven o'clock, the prosecutor, *George Cross*, was informed that a disturbance was going on in *Patfield*. He went thither and found the defendant's wife sitting under the hedge opposite to the defendant's cottage with her three children. She was crying. This was a little after eleven. Prosecutor went with her into the defendant's cottage and found defendant seated and intoxicated, but sufficiently sober to know what he was doing. Defendant's wife then, in the hearing of defendant, stated to the prosecutor that defendant had knocked her down and beaten her shamefully. *Henry Cook*, a near neighbour of defendant, was present, and he also stated to prosecutor, in the defendant's hearing, that he had seen defendant knock his wife down and jump upon her, she being advanced in pregnancy. *Henry Cook* had seen defendant do this a few minutes before eleven. Defendant said nothing on hearing these statements. Prosecutor quitted the cottage, leaving the defendant and his wife and children in it. Defendant came out immediately and closed the outside shutters, and then went inside his cottage and locked the outer door. Prosecutor remained outside and heard defendant using violent and threatening language to his wife, and saw her run out of the cottage with her children. Defendant said he would lock

1857.
LIGHT'S
Case.

them out all night, and thereupon they went back again into the cottage. Prosecutor heard defendant again use very violent language, and he (the prosecutor) opened the outside shutters, and he and *Henry Cook* (before mentioned) looked in, and both of them saw the defendant take up a shovel and hold it in a threatening attitude over his wife's head, and they heard him say at the same time "If it was not for the bloody policeman outside I would split your head open, for 'tis you that sent for the policeman." Defendant was near enough to his wife to have struck her with the shovel at the time he raised it and spoke these words. Defendant then took off some of his clothes, as if he was going to bed, and lay down on a sofa. His wife asked him to go up stairs and let her have the room below to herself. He got up and went out of the back door and she unlocked the front door. He came back immediately and said, "There, my lady, take yourself off to bed." She replied, "I can't go up stairs in this state; I don't know one hour from another when I might be murdered." Defendant said, with an oath, "I'll leave you altogether," and he then put on the clothes he had taken off and went out. This was about twenty minutes after he had lifted the shovel over his wife's head. He went down the highway towards his father's house, which is about 200 yards from his own cottage. Prosecutor followed him, and when defendant had walked about seventy yards from his own cottage prosecutor took him into custody. Prosecutor had no warrant. *Henry Cook* (before mentioned) had been with the prosecutor all the time these things were occurring, and insisted on prosecutor taking defendant into custody, because he thought it would not be safe to let him go back to his wife that night. Defendant, on being taken into custody, put his hands into

prosecutor's neckcloth and struggled with prosecutor, who became exhausted and fell, and the defendant got away from him. He was afterwards taken on a warrant and tried as above stated.

1857.

 LIGHT'S
Case.

It was objected, on behalf of the defendant, that the officer of police (*George Cross*) was not in the "due execution of his duty" when he arrested the defendant, inasmuch as he had *no warrant*; that the words spoken at the time when defendant lifted up the shovel disproved the intention to commit an assault; and, further, that the prosecutor suffered considerable time to elapse before he took the defendant into custody, and that when he did so defendant was peaceably walking away in a direction from his cottage.

The Court overruled the objections, and the jury found the defendant guilty. He was sentenced to imprisonment; but, with a view to the propriety of the conviction being submitted to the Court of Criminal Appeal, he was discharged on bail in order that the judgment of that Court could be taken. The opinion of the Court of Criminal Appeal is accordingly requested on the foregoing case.

This case was argued on the 14th *November*, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., MARTIN B. and CHANNELL B.

Hurst appeared for the prisoner; no counsel appeared for the Crown.

Hurst, for the prisoner. First, the officer had seen no assault actually committed, and was not justified in taking the defendant into custody without a warrant. When the prisoner held up the shovel the act was accompanied by language which showed he did not intend to use it.

ERLE J.—There were menacing words and a

1857.

 LIGHT'S
Case.

menacing attitude—the animus coupled with a present ability.

Hurst. The words used at the time may so explain the intention of the party as to qualify his act and prevent it from being deemed an assault. In *Tuberville v. Savage* (a) the defendant laid his hand upon his sword and said, “If it were not the assize time I would not take such language from you;” and this was holden not to be an assault.

COCKBURN C. J.—Suppose the defendant had drawn his sword and held it over the head of the plaintiff. The words used by the prisoner can only show that he did not intend to go to the extent of splitting his wife’s head open.

ERLE J.—Because of the presence of the policeman.

MARTIN B.—If a man puts his fist in another’s face and says, “I don’t mean to assault you,” is it the less an assault?

Hurst. Secondly, the officer did not take the prisoner into custody on witnessing the assault; twenty minutes were permitted to elapse, and the man was not taken until he had left the house, expressing his intention not to return. He was walking from the house and towards the residence of his father and using language which disproved any aggressive intention. The policeman, having no warrant, had no right, then, to take him into custody; *Regina v. Walker* (b).

ERLE J.—Did not the policeman apprehend him to prevent a repetition of the offence? *Cook* insisted on the defendant being taken, because he thought it would not be safe to let him go back to his wife.

Hurst. That was a matter of opinion, on which a magistrate might act; but a constable is not entrusted with any such discretion.

(a) 1 Mod. 3; S. C. 2 Keb. 545, cited 1 Russ. on C. & M. 750.

(b) Dears. C. C. 358.

ERLE J.—If two persons are found committing a violent assault, and a constable takes one and locks him up, may he not afterwards return and apprehend the other?

1857.

 LIGHT'S
Case.

Hurst. Yes, if it is done in a reasonable time after.

COCKBURN C. J.—In *Walker's case* the prisoner had assaulted a police constable, who went away, and after two hours time returned and took him into custody. The Court held that that was an unlawful apprehension, and POLLOCK C. B. said, “The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit. The interference of the officer, therefore, was not for the purpose of preventing an affray, or of arresting a person whom he had seen recently committing an assault; the apprehension was so disconnected from the offence as to render it unlawful.”

Hurst. Section 11 of 14 & 15 *Vict. c. 19.* enacts that it shall be lawful for any person to apprehend any person who shall be found committing an indictable offence in the night time; but the object of that statute being the prevention of offences in the night, it was only intended, by this enactment, to authorize the taking persons into custody at the time when they were found in the commission of offences, and was not intended to enable a police officer or any other person to arrest them afterwards without a warrant.

COCKBURN C. J.—I am of opinion that this conviction is right. It appears that the policeman himself witnessed what in point of law amounted to an assault, for he saw the prisoner hold a shovel over his wife's head, and that act was accompanied by violent language and threats. No long period elapsed between

1857.

LIGHT'S
Case.

this and the taking of the prisoner by the policeman, the prisoner continuing in all probability in the same state of mind. It is true that the arrest took place after the prisoner had left the house where his wife was; but there was nothing to show that he might not return; and indeed another person, who had seen the whole transaction, called upon the policeman to apprehend him, upon the ground that if he did return his wife's life would be in danger. The case is within the ruling of POLLOCK C. B. in *Regina v. Walker* (a). There was an assault committed; it was witnessed by the policeman; there was a continuous pursuit, with reasonable grounds for apprehending present danger, and the policeman therefore was justified in taking the prisoner into custody; the apprehension of the prisoner being lawful his resistance was illegal, and he was guilty of an assault upon the policeman in the discharge of his duty.

ERLE J.—I am of the same opinion, and I think this case is within the rule laid down in *Regina v. Walker*. The policeman took the prisoner into custody recently after he had seen him commit the offence. It is not necessary that a policeman should arrest a man at the very moment he sees an assault committed; it is quite sufficient if he arrests recently after the right to do so arises. It cannot be said that because the prisoner was coming away from the house the constable was bound to come to the conclusion that the danger was over. As a conservator of the peace he had authority to take the prisoner into custody, he having so recently witnessed the commission of an assault. Here there was a continuing danger and a continuing pursuit, and it was the duty of the policeman to exercise his authority in this case, in order to prevent a further breach of the peace.

WILLIAMS J.—I am of the same opinion. A constable, as conservator of the peace, has authority, equally with all the rest of her Majesty's subjects, to apprehend a man where there is reasonable ground to believe that a breach of the peace will be committed, and it is quite settled that where he has witnessed an assault he may apprehend as soon after as he conveniently can. He had a right to apprehend the prisoner, and detain him until he was taken before justices to be dealt with according to law. He had a right to take him, not only to prevent a further breach of the peace, but also that he might be dealt with according to law in respect of the assault which he had so recently seen him commit. The policeman was performing his duty, and the conviction was right.

1857.

LIGHT'S
Case.

MARTIN B.—I am of the same opinion, and I adopt the view taken by the Lord Chief Justice. This is entirely a question of fact. The assault committed by the prisoner, and the subsequent acts, form one continuing transaction, and I think the officer would not have done his duty if he had not apprehended the man. It is said the prisoner was going away; but if two dogs have been fighting, and one walks away, what security is there that he will not return to fight it out?

CHANNELL B.—I am entirely of the same opinion.

Conviction affirmed.

1857.

REGINA v. ELLEN JANE JOHNSON.

The prisoner was charged with stealing a number of articles laid as the property of the Bishop of *Peterborough*, the county in which the things were stolen being in that diocese.

To prove the intestacy of the person to whom the property had belonged, and that the property was in the Ordinary, it was shown that a search for a will had been unsuccessfully made in the drawers and boxes of the deceased; and that no letters of administration had been taken out in the proper local Court.

As to some of the articles mentioned in the indictment, it was shown that they were in the possession of the deceased at the time of her death; but as to the majority of the articles there was no evidence to show whether they were taken before or after her death, except that many of them were, on the day of the funeral, taken by the prisoner to the house of a witness. The Court, on the trial of the prisoner, refused to confine the case to the things shown to have been in the possession of the deceased at the time of her death; and left the whole case to the jury, who convicted the prisoner.

Held: 1. That there was sufficient evidence of the intestacy of the deceased, and that the property was in the Ordinary. 2. That the Court properly left the whole case to the jury; and that the conviction was right.

THE following case was reserved and stated by the Chairman of the *Leicestershire* Quarter Sessions.

At the General Quarter Sessions of the Peace holden at the Castle of *Leicester*, in and for the county of *Leicester*, on *Monday*, the 19th day of *October* 1857, *Ellen Jane Johnson* was indicted for that she, on the 17th day of *September*, in the year of our Lord 1857, one eye glass, one tea spoon, one hearth rug, two pieces of carpet, one flannel petticoat, three sheets, two pillow cases, one piece of bed hanging, one pot of preserved raspberries, one pair of goloshes, two brushes, one reticule, one milk tin, one towel, one toasting fork, one ladle, one half pint tin, one paste tin, one tin bowl, one pair of boots, five glass bottles, one stone bottle, one door mat, one velvet bag, one calico bag, one shawl, three pickle jars, three basins, one cullender, one puncheon, and one Bible, of the goods and chattels of the Right Reverend the Lord Bishop of *Peterborough*, she did feloniously steal, take and carry away.

The county of *Leicester* is within the diocese of *Peterborough*.

At the trial, the counsel for the prisoner objected, first, that there was not sufficient evidence to go to the jury of the intestacy of *Francis Knight* deceased, to whom the articles stolen had belonged at the time of the decease. The evidence adduced on this point was as follows:—

Mary Ann Hinks, the wife of *Richard Hinks*, of *Humberstone*, farmer, stated that the deceased was her husband's aunt; that she died on the 14th day of *September* last, and was buried on the *Thursday* following, *September* 17th; that she made no will, and no letters of administration had been taken out: and, on further examination, stated that there had been a sale of the deceased's property by her (the witness's) husband's direction; that she believed the produce of the sale had been received by her husband, and that she and her husband had searched the whole of the drawers and boxes of the deceased, but could find no will; that they had taken every means to find a will, but no will had turned up, and witness believed that there was not one. The deceased had received money from Mr. Spooner, a lawyer in *Leicester*, but witness did not know whether any application had or had not been made to Mr. Spooner to ascertain if he had a will of the deceased in his possession.

Charles Oliver Clarke, a clerk to prosecutor's attorney, proved that he had searched the register of the proper local Court, but no letters of administration had been taken out.

It was further objected by the counsel for the prisoner, that the property might have been stolen from the deceased before her death, and was therefore improperly laid as the property of the Bishop of *Peterborough*, as to which the following evidence was adduced:—

The witness *Mary Ann Hinks* stated that she found

1857. three flannel petticoats after the death of the deceased, and missed one on the 17th of *September* (the indictment charges a larceny of one flannel petticoat); that a bag was also missed after the funeral. *Henrietta Maria Gandy*, a witness, stated that the Bible (produced), or one like it, was in the window of the room in which the deceased died on the morning she died. *Eliza Taylor*, a witness, stated that the prisoner brought a number of things to her house on the 17th of *September*, which were afterwards given up to the policeman.

JOHNSON'S
Case.

The counsel for the prisoner asked the Court if he were to confine his defence to the petticoat above mentioned; but the Court determined to let the whole case go to the jury, and the prisoner was found guilty.

If the Court shall be of opinion that there was no evidence to go to the jury of the intestacy of the deceased, or that there was no evidence that all or any part of the property stolen was stolen after her death, and that the property in the goods stolen, or any part of it, was improperly laid to be in the Lord Bishop of the diocese, and that, therefore, the conviction was wrong, the same to be quashed; otherwise to be affirmed.

Judgment on the conviction was postponed, and the prisoner was admitted to bail to appear and receive judgment.

Berners,
Chairman.

This case was argued on 21st *November*, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., CROMPTON J. and CHANNELL B.

C. G. Merewether appeared for the prisoner; no counsel appeared for the Crown.

C. G. Merewether, for the prisoner. The question ought not to have been whether there was evidence of

the intestacy of the deceased, but whether there was any evidence that the property was in the Ordinary. I say that there was no sufficient evidence of that.

1857.

JOHNSON'S
Case.

COCKBURN C. J.—Go by steps. First, is there any proof of intestacy? Suppose the property stolen was the property of the deceased at the time of her death, and there was no will, in whom would the property be?

Merewether. It is said to be in the Ordinary.

ERLE J.—It is in the Ordinary. Then, can there be any better evidence of intestacy than proof of the non-existence of a will?

COCKBURN C. J.—*De non apparentibus et non existentibus eadem est ratio.* The way to prove intestacy is to show that search has been made for a will, and that no will has been discovered.

Merewether. Secondly. A great many articles are specified in the indictment, and although there is evidence that some of these were in the possession of the deceased at her death, as to the majority of the articles there is no such evidence; as to the majority of the things they might have been stolen before the death, and, if so, the property would not be in the Ordinary.

CROMPTON J.—It is stated that three petticoats were seen after the death of the deceased, and that one was missed on 17th *September*, the deceased having died on the 14th. How do you get out of the petticoat?

ERLE J.—The conviction is right if there is evidence that the prisoner was at her death possessed of any one of the articles stolen.

Merewether. The Court ought to have told the jury to confine their attention to the case as to the petticoat; but the chairman let the whole case go to the jury, and the prisoner was thereby prejudiced; besides, if the prisoner should be again indicted for

1857.

JOHNSON'S
Case.

stealing the other articles, she might be prevented from pleading *autres fois convict*, because it would be said that she never was in peril as to those things.

CROMPTON J.—I think the chairman would have done very wrong if he had confined the case as requested.

ERLE J.—Fifteen years have elapsed since Mr. Peacock first put forward the argument as to a prisoner's right to be able to plead *autres fois convict*; but I have always regarded it as unintelligible.

COCKBURN C. J.—We have no doubt that this conviction is right. The question whether the property is properly laid in the Ordinary depends upon whether the property was stolen before or after the death of the deceased. The intestacy is proved, and therefore what property she had at the time of her death was in the Ordinary. Several articles which had belonged to the deceased were found in the possession of the prisoner; at all events as to one, the petticoat (that article being included in the indictment), it is proved that it was in the possession of the deceased at the time of her death, and the Bible also appears to have been in the window of the deceased's room on the morning of her death. There is, therefore, evidence that some of the things were taken after the death of the deceased, and probably all had been stolen since that time, although that was not necessary to sustain the conviction.

ERLE J.—I am of the same opinion. There was ample evidence that some of the articles were taken after the decease, and a probability that the others were taken at the same time. It is clear that the counsel for the prisoner had no right whatever to call upon the Court to elect which of the articles should be submitted to the jury, and as to which the prosecution should be abandoned.

WILLIAMS J.—I am of the same opinion.

CROMPTON J.—I am unable to see any doubt at all in the case.

CHANNELL B.—I am of the same opinion.

Conviction affirmed.

1857.

JOHNSON'S
Case.

REGINA v. JOHN POOLE and JOHN YEATES.

1857.

THE following case was reserved and stated by
BRAMWELL B. at the Summer Assizes 1857.

The defendants were convicted before me at the Assizes for the city of *Worcester* of stealing from their master.

The master was a glovemaker, the defendants were in his employ as glove finishers. When they had done any work, the practice was to take the finished gloves to an upper room and lay them on a table, in order that the workmen might be paid according to the number finished. The defendants broke open a store-room on the premises of the master, took a quantity of finished gloves out, and laid them on the table in the upper room, also part of the same premises, with intent fraudulently to obtain payment for them as for so many gloves finished by them. The gloves were never off the master's premises. Doubting the sufficiency of this evidence, I reserved the point, and ordered the prisoners to be bailed on finding sureties. See *Regina v. Holloway* (a).

G. BRAMWELL.

The prisoners were convicted of stealing gloves the property of their master. The prisoners were in the prosecutor's employ as glove finishers, and the practice was to take the finished gloves into an upper room on the prosecutor's premises and lay them on a table in order that the workmen might be paid according to the number they had finished. The prisoners took a quantity of finished gloves out of a store-room

on the same premises, and (without removing them from the premises of the prosecutor) laid them on the table in the said upper room with intent fraudulently to obtain payment for them as for so many gloves finished by them. *Held*, that the conviction was wrong. *Regina v. Holloway*, 1 Den. C. C. 370, approved.

1857.

 POOLE'S
Case.

This case was argued on 21st *November*, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., CROMPTON J. and CHANNELL B.

E. V. Richards appeared for the Crown ; no counsel appeared for the prisoners.

E. V. Richards, for the Crown. This case was tried before BRAMWELL B., and the case of *Regina v. Holloway* (a) being cited on behalf of the prisoner, his Lordship considered that the decision in that case could not be supported, and in that view MARTIN B. concurred, and the point was therefore reserved. In *Regina v. Holloway* the prisoner was indicted for stealing skins of leather, and there was a special verdict that the prisoner took the skins, not with intent to sell or dispose of them, but to bring them in and charge them as his own work, and to get paid by his master for them ; the skins not having, in fact, been dressed by the prisoner, but by another workman ; and the Court held this not to be a larceny. That case was followed by *Regina v. Hall* (b), in which the prisoner wrongfully took the goods of the prosecutor, and offered them for sale to the prosecutor as the goods of another person, and that was held to be a larceny ; and *Alderson* B. distinguished that case from *Regina v. Holloway* by saying, that in the latter case the prisoner never intended to treat the goods as the property of any one but the real owner. I cannot distinguish the present case from that of *Regina v. Holloway*.

ERLE J.—The law is correctly laid down in *Regina v. Holloway*, and the distinction between that case and *Regina v. Hall* is very clear. The test is, whether the person who takes the property assumes to exercise dominion over it as owner. The offer to

(a) 1 Den. C. C. 370.

(b) 1 Den. C. C. 381.

sell, in *Regina v. Hall*, was the strongest evidence of the intention of the prisoner to exercise dominion over the goods.

1857.

 POOLE'S
Case.

WILLIAMS J. referred to *Rex v. Webb* (a), in which it was held that it was not larceny for miners employed to bring ore to the surface, and paid by the owners according to the quantity produced, to remove from the heaps of other miners ore produced by them and add it to their own, in order to increase their wages, the ore still remaining in the possession of the owner.

ERLE J.—In larceny there must be the intent to vest the property in the thief by wrong.

Richards. It is said, in *Regina v. Holloway*, that the intention must be permanently to deprive the owner of the property; but it seems to be a dangerous doctrine that an intention to return will excuse the taking. Here the intention was to return the gloves to the owner, but subject to a lien for the work intended to be done upon them.

COCKBURN C. J.—Not so. There is no lien.

CROMPTON J.—If the prisoners had obtained a lien the case might have been different; but the offence intended seems to be that of obtaining money by false pretences.

ERLE J.—It is important that offences should be accurately defined; and *Regina v. Holloway* has defined the *animus furandi* to mean an intention to vest the property in the thief by wrong, and consequently to divest the real owner.

COCKBURN C. J.—I do not see how this case is distinguishable from *Regina v. Holloway*, which I think is decided on very sound principles.

CROMPTON J.—I confess I am not quite so clear as

1857.

POOLE'S
Case.

to the principle of that decision. If this had been the first time the point had been raised I should have been inclined to think that there was sufficient here to make out the *lucri causâ*; but we are bound by authority, and the conviction must be quashed.

Conviction quashed.

1857.

REGINA v. ROBERT WATSON.

The prisoner, by false and fraudulent representations made to the prosecutor as to his business, customers and profits, induced the prosecutor to enter into a partnership with him and to advance 500*l.* as part of the capital of the concern; and the prosecutor, after such advance, recognized and acted upon such partnership. Held, that this was not an obtaining of money by false pretences within the meaning of the statute.

THE following case was reserved and stated by the Chairman of the *Bury Saint Edmunds* Sessions.

At the Midsummer Sessions, held at *Bury Saint Edmunds* in July, 1857, *Robert Watson* and *Mary* his wife were indicted for obtaining money under false pretences upon an indictment, a copy of which is hereunto annexed (a).

(a) *Suffolk*, to wit.] The jurors for our lady the Queen upon their oath present that *Robert Watson* and *Mary Watson* on the 18th day of *February* in the year of our Lord 1857 unlawfully knowingly and designedly did falsely pretend to one *Joseph Irving* that he the said *Robert Watson* had entered into a contract with Messieurs *Hoare* the great brewers to make malt for them by commission at a profit of four shillings per quarter by means of which said false pretence they the said *Robert Watson* and *Mary Watson* did then unlawfully obtain from the said *Joseph Irving* five hundred pounds of the money of him the said *Joseph Irving* with

intent thereby then to defraud whereas in truth and in fact the said *Robert Watson* had not entered into a contract with the said Messieurs *Hoare* to make malt for them by commission at a profit of four shillings per quarter or into any other contract whatever with the said Messieurs *Hoare*, to the great damage and deception of the said *Joseph Irving* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

2. And the jurors aforesaid upon their oath aforesaid do further

The female prisoner was acquitted during the trial. The male prisoner was convicted upon the three first counts of the indictment, and sentenced to be imprisoned to hard labour in the House of Correction at

1857.

 WATSON'S
Case.

present that the said *Robert Watson* and *Mary Watson* on the said 18th day of *February* in the year of our Lord 1857 unlawfully knowingly and designedly did falsely pretend to the said *Joseph Irving* that he the said *Robert Watson* then occupied a malting office at the *Hythe* near *Colchester* and that he was then making malt for Messieurs *Hoare* at such malting house by means of which said false pretences they the said *Robert Watson* and *Mary Watson* did then unlawfully obtain from the said *Joseph Irving* five hundred pounds of the money of him the said *Joseph Irving* with the intent thereby then to defraud whereas in truth and in fact the said *Robert Watson* did not then occupy any malting office at the *Hythe* near *Colchester* nor was he then making malt there or elsewhere for Messieurs *Hoare*, to the great damage and deception of the said *Joseph Irving* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

3. And the jurors aforesaid upon their oath aforesaid do further present that the said *Robert Watson* and *Mary Watson* on the said 18th day of *February* in the year of our Lord 1857 unlawfully knowingly and designedly did falsely pretend to the said *Joseph Irving* that the average sale of porter by the said *Robert Watson* was from thirty to forty barrels per week on

which sales there was a profit of twenty pounds ten shillings and that the average sales in oil cake amounted to ten tons per week and that the average profit from such last mentioned sales was ten pounds per week by means of which false pretences they the said *Robert Watson* and *Mary Watson* did then unlawfully obtain from the said *Joseph Irving* the sum of five hundred pounds of the money of him the said *Joseph Irving* with intent thereby then to defraud whereas in truth and in fact the average sale of porter by the said *Robert Watson* was not from thirty to forty barrels per week nor was there on such sales a profit of twenty pounds ten shillings nor did the average sales in oil cake amount to ten tons per week nor was the average profit from such last mentioned sales ten pounds per week, to the great damage and deception of the said *Joseph Irving* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

4. And the jurors aforesaid upon their oath aforesaid do further present that on the said 18th day of *February* in the year of our Lord 1857 the said *Robert Watson* and *Mary Watson* did falsely pretend to the said *Joseph Irving* that he the said *Robert Watson* had therefore entered into a contract with Messieurs *Hoare and Company* the great brewers to make malt for

1857.

WATSON'S
Case.

Bury Saint Edmunds for six calendar months; but, upon application on behalf of the prisoner for a case for the decision of the Court of Criminal Appeal, upon the ground that it was a matter which ought to

them by commission at a profit of four shillings per quarter and that he the said *Robert Watson* then occupied a malting office at the *Hythe* near *Colchester* where he was then making malt for Messieurs *Hoare and Company* at such malting house under such contract and that the average weekly profit arising from the sale of porter and oil cake by the said *Robert Watson* was thirty pounds ten shillings by means of which said false pretences they the said *Robert Watson* and *Mary Watson* did then unlawfully obtain from the said *Joseph Irving* the sum of five hundred pounds of the monies of him the said *Joseph Irving* with intent thereby to defraud whereas in truth and in fact the said *Robert Watson* had not theretofore entered into any contract with the said Messieurs *Hoare and Company* to make malt for them by commission at a profit of four shillings per quarter nor had the said *Robert Watson* entered into any contract whatever with the said Messieurs *Hoare and Company* to make malt for them on any terms whatever and whereas also in truth and in fact the said *Robert Watson* did not then occupy nor had he at any former time occupied any malting house at the *Hythe* near *Colchester* nor was he then making malt at such malting house or at any other malting house whatever for the said Messieurs *Hoare and Company* under such contract or under any contract whatever with the said Messieurs *Hoare and Company* and

whereas also in truth and in fact the average weekly profit arising from the sale of porter and oil cake by the said *Robert Watson* was not thirty pounds ten shillings, to the great damage and deception of the said *Joseph Irving* to the evil example of all others in the like case offending against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

5. And the jurors aforesaid upon their oath aforesaid do further present that on the said 18th day of *February* in the year of our Lord 1857 the said *Robert Watson* and *Mary Watson* did falsely pretend to the said *Joseph Irving* that the said *Robert Watson* had heretofore entered into a contract with Messieurs *Hoare and Company* the great brewers to make malt for them by commission at a profit of four shillings per quarter and that he the said *Robert Watson* then occupied a malting office at the *Hythe* near *Colchester* where he was then making malt for Messieurs *Hoare* at such malting house under such contract and that the average weekly profit arising from the sale of porter and oil cake by the said *Robert Watson* was thirty pounds ten shillings by means of which said false pretences they the said *Robert Watson* and *Mary Watson* did then unlawfully obtain from the said *Joseph Irving* the sum of twenty pounds of the monies of him the said *Joseph Irving* with intent thereby then to defraud

have been decided by a civil action and not to have been made the subject of a criminal prosecution, the Court respited the judgment upon the defendant finding bail, himself in 100*l.* and two sureties in 100*l.* each, upon condition that he appear and render himself when called upon.

The evidence upon which the jury were called upon to decide, as entered in my notes, was as follows:—

The Evidence from Chairman's Notes.

Joseph Irving.—I am a clergyman of the Church of England and prosecutor. On January 31st I saw an advertisement in the *Times*. “Partnership.—Wanted a partner, who can command a moderate amount of capital to join an established mercantile business in the country, of gentlemanly character. No one need apply who cannot give first class references, as the respectability of the party making application is more the object of the advertiser than capital. Address, post-paid, to *Beta*, Post-office, Colchester, Essex.”

I answered it, and requested particulars of the partnership, to be directed to Dr. *Irving*, Hill Road, St. John's Wood, London.—February 3rd, 1857, received a letter from *Watson*.

whereas in truth and in fact the said *Robert Watson* had not heretofore entered into any contract with the said Messieurs *Hoare and Company* to make malt for them by commission at a profit of four shillings per quarter nor had the said *Robert Watson* entered into any contract whatever with the said Messieurs *Hoare and Company* to make malt for them on any terms whatever and whereas also in truth and in fact the said *Robert Watson* did not then occupy nor had he at any former time occupied any malting house at the *Hythe* near Colchester nor was he then making malt at such malting house or at any other malting house

whatever for the said Messieurs *Hoare and Company* under such contract or under any contract whatever with the said Messieurs *Hoare and Company* and whereas also in truth and in fact the average weekly profit arising from the sale of porter and oil cake by the said *Robert Watson* was not thirty pounds ten shillings, to the great damage and deception of the said *Joseph Irving* to the evil example of all others in the like case made offending against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

1857.

WATSON'S
Case.

1857.

 WATSON'S
Case.

“ *Wiston House, Wiston, Suffolk,*
“ *February 3rd, 1857.*

“ Sir,—I received your letter in answer to my advertisement, addressed to *Beta, P. O., Colchester*. My business is that of a country merchant, and my object is to receive a gentleman into my business who will unite with me in the general duties of the same and coincide in the management, &c., &c., which is conducted without risk. My connexion very old established, and the profits very considerable, and done principally for cash. My customers are amongst the first farmers in the county. I make large sales in linseed and rape cakes, &c., &c., for agricultural purposes, and do considerably with two of the first brewers in *London* in stout and porter, which I supply wholesale to private families. The calling is considered gentlemanly and not of a sedentary character, the principal part of my time being occupied in riding round amongst my connexion and in attending different markets, where I make sales and receive my assets; and now as to capital.

“ I am in excellent credit and have ample capital to conduct my business; therefore, the amount that you can command will only be a secondary consideration if we can agree on other points; but I hope you will not hesitate to state what amount you have at liberty. I think we cannot fully understand each other without an interview; and as it is probable I shall be in *London* within a week or ten days, if you think further of the matter, I propose that you shall call upon me at the *Four Swans Hotel, Bishopgate Street, London*. This will give us both an opportunity of judging as to a probability of a partnership. I will let you know upon what day upon hearing from you again. I am, sir, yours most obediently,

“ *R. Watson.*”

I went to the *Four Swans* on *February 13th*, about eleven in the morning.—*Watson* was there.—He stated he had an order from *Hoares* to make as much malt as he could for them.

Hoares were large brewers in *London*.

The contract was worth 2000*l.* a year at least.

He said he had ample capital to carry on the business, and his credit was as good as any man could have.

He said he did not want the money to carry on the business; he had plenty of capital; but he wished my money to give me an interest in the business.

He said the profit was 4s. per quarter.

He asked what amount of capital I had.—I said 500l.; and if the business was as he stated I had no objection to advance 500l. or 1000l. more.

He also stated he had a porter business, the particulars of which he would give me at *Wiston*.—I made an appointment to go on the 17th.

Mrs. *Watson* was present at the latter part of the conversation.—She said they had the malting with the Messrs. *Hoares*, and also a large porter business.

I went to *Wiston House, Nayland*, on the 17th. On the morning of the 18th *Watson* took out a letter which he said was from *Hoares* and the contract to make malt; that it contained the terms he had told me in *London*.—Mrs. *Watson* was in the room.—He produced a sample of malt which he said was what he was making at the *Hythe, Colchester*.—He said he was going to buy a large quantity of wood for his malting at *Hythe*.—That he had heard Mr. *Robinson* had wood to sell at *Hadleigh*, which would cost 500l. at least, and that he intended to buy it; that he was looking out for two or three maltings, and was going to ask his friend *Postans* to get them.

Statement given me by Mrs. Watson.

“Average sales, from 30 to 40 barrels per week.

“Calculate two-thirds for the family trade, and one-third for the hotel keeper.

“For the family trade, 20 barrels or 40 kilderkins.

“40 kilderkins, at a profit of 9s. per kildn. £18 0 0

“10 barrels, at a profit of 5s. per barrel . 2 10 0

£20 10 0

“Average sales in oil-cake amount to 10 tons per week, average profit 1l. per ton.

“Profit on 10 tons £10 0 0

“Profit on porter 20 10 0

£30 10 0”

1857.

WATSON'S
Case.

1857.

WATSON'S
Case.

Watson was not in the room when the paper was given me, but came in immediately.

The money passed before *Mrs. Watson* gave me this. I believed representations made by both the defendants.

I paid 20*l.* because I really believed the contract with *Messrs. Hoare* was true.

This was my sole reason.

Mrs. Watson gave me the agreement.—I saw her write it. It was not stamped then.

I had paid the 20*l.* before that agreement was written.—*Watson* was in and out.—He gave no directions.—We both signed it.

“Memorandum of agreement made this 18th day of *February*, 1857, between *Joseph Irving*, *Hill Road*, *St. John's Wood*, *London*, and *R. Watson*, merchant, *Wiston*, *Suffolk*. It is now agreed that in consideration of *R. Watson* admitting *J. Irving* into his business and giving him one-half share of the profits of the same, *Joseph Irving* will advance the sum of 500*l.*, 20*l.* to be paid on the signing of this agreement, and a further sum of 380*l.* to be paid within four days from the signing of this agreement, and a further sum of 100*l.* to be paid on the 25th of *March* next. And it was also clearly and distinctly understood that the said *R. Watson* and *J. Irving* will give their whole time and attention to promote the interest and general benefit of the same.—Signed this 18th day of *February*, 1857.

“Witness,

“*Mary Watson*. }

“*R. Watson*.

“*J. Irving*.”

I parted with my money on the faith of their representations.

I bought a house at *Stratford*, seven miles from *Nayland*. I should not have bought it but from their representations.—I never went to live there.

I was backwards and forwards to *London* till *May* 16th.—On the 7th of *May*, *Watson* repeated that the profits were very large.

I never could get sight of the books, nor did I ever get any money.

There was very little business carried on.—I bought the house of *Postans*.

May 13th was the first day I had any idea the business was a rotten concern.

Went to *Harris* with *Postans*.—*Watson* told me he dealt with *Harris* for oil cake.

May 16th went to *Watson's* house.—I, *Postans* and *Robinson* saw *Watson* first.

Watson stated he would not say anything unless in the presence of his solicitor.

He said he had no capital; he had credit, and he considered that capital.

He said his porter trade was a very good one, and he did a great deal of business.

He shortly after went away.—He did not return for some hours.—We waited.—Mrs. *Watson* begged us to wait.

Mr. *Robinson* said she must be careful what she said, as both she and her husband had rendered themselves liable to a criminal prosecution.—She said she was very sorry for the part she had taken in it, that they had both duped me, and there was very little business—that only 50% of porter had been bought since the beginning of the year, that *Watson* kept no books, and had none, and that any entries that were made of the business were made by herself; she said over and over again, could there not be some arrangement entered into?—When *Watson* came back, she said for what he had done to me he ought to go down on his knees and beg my pardon.—*Watson* said I do beg his pardon.

The money I paid was my own dividend from the *British Bank*.

[Cross-examined for *Watson*.] — A clergyman.—Twenty years.—No preferment.

I am married.

Never answered advertisements before.

I assumed the name of Dr. *Irving*, as the advertiser assumed that of *Beta*.

It was four or five weeks before I told *Watson* I was a clergyman.—I passed as Mr. *Irving*.—A considerable time after I was introduced to *Postans* as *Watson's* partner at my request.—My attention was not called to any particular business (Letter, *February* 3rd.)—A merchant's business.—Nothing about malting.—*Watson* stated at the *Four Swans* the profit was 2000*l.* a year.—I did suppose I was to receive 1000*l.* a year for the payment of 500*l.*—He said he wanted my money to give me an interest in the business.—It was

1857.

 WATSON'S
Case.

1857.

 WATSON'S
Case.

to be at his bankers to add to his other capital.—I paid the 500*l.* to give me an interest in the business.

I would have nothing to do with selling the porter—my business was with the malting, but I was to receive the profits.—I knew nothing of making malt.—I was to superintend generally.

I was to receive 1000*l.* a year, so he said, and so I believed it.

I was on friendly terms with the *Watsons*.—Went out together.

I was never allowed to go by myself, or I should have found out there were no maltings.

In *February* I made enquiries.—*Watson* said he had finished malting and sold his malt.—He told me there would be a good deal made.

I did not ascertain because I never doubted his word.—At *Watson's* request I bought a house for 1400*l.*—It is not paid for.—Have been offered 100*l.* more than I gave.—I don't know *Harrison*.—I have written to him—first, shortly after *May 7th*.

I expected the profits would be divided in *August*, and would be considerable.

I expected an appointment to a grammar school at *Wisbeach*.—I did not accept it.

I expected *Harrison* to give me 300*l.* making 800*l.*, when I knew the thing was not as represented.—I withdrew my letter.—I would not deceive any man.—When the sample of malt was produced, *Watson* first said it was made by himself; then he said it was made by *Brown*, of *Nayland*.—He never gave me the letter, but appeared to read from it.—I did not ask for it.—I believed what he said.

[Cross-examined for *Mary Watson*.]—I wrote on the same day, *January 31st*.—Eighteen days after concluded the bargain.

I paid 500*l.* in expectation of receiving 1000*l.* a year, by half-yearly payments.—I was to get 500*l.* back in six months, and then 1000*l.* a year.

I was ready to do anything.

I did nothing.—I spent two months backwards and forwards.—I offered to do anything in the office—to write letters.

I bought a gig to go about.—Always at *Watson's* house.—
Never made any compensation to *Watson*.

1857.

WATSON'S
Case.

Watson told me they malted all the year.—I learned they did not malt in hot weather. Did not ask to look at the books before I entered the partnership. The malting was my temptation—Porter of secondary importance—Went to the house about midday—it was cold—did not go out on the 17th *February*.

Conversation begun by *Watson* producing the letter from *Hoare*.—I did not say I am perfectly satisfied.—I said I would enter into the partnership.—I asked if money was usual to pass—he said yes. I handed 20*l*.—I did not pay the 100*l*. till *April* 27th.

Not any suspicion crossed my mind till after *May* 7th. Wrote to *Harrison* 8th or 9th *May*.

Slept at *Watson's* *May* 16th—brought back *Postans* and *Robinson*—did not part with Mrs. *Watson* on friendly terms. We wanted *Watson* to prove there really was a business.—I did not state I had any criminal charge against him.

Robinson went to *Nayland*. *Watson* was tipsy when he returned.—We agreed he was not in a fit state to be spoken to.—Mrs. *Watson* was greatly distressed, in tears. The memorandum was given to me as a finished memorandum.—She did not say it should be so many barrels per month and not per week, in my presence.

[Re-examined.]—*Watson* knew I was going to write to *Harrison*.—I did write to *Harrison*—after *May* 16th I withdrew my letter.

I then believed the business was well worth what I asked, and believed in the statements of *Watson* and Mrs. *Watson*.

My eyes were opened on the 16th.—*Watson* and *Mary Watson*, both said I had been duped.

I have refused to see the parties.

I have a son twenty years of age.—I intended the business for him.

I really believed I should get the income.—I paid the money to his private account as a premium.

Frederic Woodbridge.—Partner with Messrs. *Hoare*.

There was a treaty for contract, but never carried out, with *Watson* and *Hurle*—None on the 31st *January*.

None with *Watson*.

1857.

 WATSON'S
Case.

After *January* had an interview with *Watson*.—He was drunk. Never any transaction in malt and barley.

[Cross-examined.]—We had a business transaction with *Watson* and *Hurle* for porter, 95*l*.

Watson proposed to become agent.—It was stopped, as on the 10th *February* we refused to send an order.

Richard Postans, farmer, *Shelly, Nayland*.]—*Watson* and Mrs. *Watson* came over—introduced *Irving* as purchaser of a house I had to sell—arranged for 1400*l*.—*Irving* to make improvements, which are now going on.—I have been in their company since I heard about the partnership.—*Watson* said he had entered into a contract to make malt for *Hoares*.—He took out a paper which he said was a contract to make malt, and would bring him in 2000*l*. a year.—I saw something which he took from his pocket.—*Watson* said he would buy all the wood he had in *Justice Wood*.—He said he was carrying on two maltings, and wanted three more.—This was *March*.—I should say not the season to hire maltings—After I knew *Irving* was partner I cautioned him.

May 16th.—Went with *Irving* and *Robinson* to *Watson's*. I saw a paper, the statement.—Mrs. *Watson* said it was a true account.—I said the whole calculation was carried out for the year.—Mrs. *Watson* said she was not aware it was carried out—she intended so much per month instead of so much per week—she did not know she had carried it out.

Asked *Watson* for books and agreements.—He did not produce anything, he went away.—Mrs. *Watson* begged us to stay, as she was very anxious the thing should be settled and the books shown—she was in tears a good part of the afternoon—she said they had together wronged Mr. *Irving*.—*Watson* came home in the evening intoxicated.—Mrs. *Watson* said she had begged Mr. *Irving's* pardon for what they had done, and recommended him to do the same, which he did.

[Cross-examined for *Watson*.]—*Watson* said the profit was 4*s*. per quarter—It was the wrong season to hire maltings.—Maltings begin in *September* and end in *April*.—He could not want them for that season.

When we were at *Watson's*, he said he would do nothing without the lawyer.

[Cross-examined for Mrs. *Watson*.]—I am not sure if *Irving* was present when Mrs. *Watson* said, "I did not know I had carried it out."

I think he was.—I think all were there.—I don't remember who produced the statements.

1857.

 WATSON'S
Case.

Robinson, attorney for prosecution.—Offers have been made to compromise the matter and refused. I was at *Watson's* with *Irving* and *Postans*.—*Watson* was there.—I requested to see the books and the name of his attorney before I entered on business.—I gave *Watson* the names of several attorneys.

Watson said if I consult any one it will be Mr. *Gooday*.—I said I feared they had brought themselves within the criminal law and I must decline any negotiation.—*Watson* left the room and said he would be back.—This was twelve o'clock.—He came back about six in the evening.—Mrs. *Watson* said, pray stay till my husband returns.—I went out.—I waited in the garden.—Returned about half-past four.—Walked with Mr. *Irving*.—Mrs. *Watson* fetched us in.—I said I beg you to say nothing in the absence of your husband.—Mrs. *Watson* said, since the contract was signed 50*l.* would cover all the property purchased since the partnership.—*Watson* said no, my business is worth 500*l.* a year.—Mrs. *Watson* said it was entirely a misrepresentation by *Watson*, and that she had also been the instrument in deceiving Mr. *Irving*—she was liable to be prosecuted with her husband—it was the greatest trial she had ever had to encounter, and had been betrayed by her husband—we will make the best offer we can to settle it.

A verdict of Not guilty was taken against *Mary Watson*.

Evidence was then given that *Watson* did not occupy a malting office at the *Hythe*.

Joseph Irving.—*Watson* acknowledged having received the 380*l.*, and since the 100*l.*

Verdict.—*Robert Watson*, Guilty on the first, second and third counts; and Not guilty on the fourth and fifth.

Sentence.—Six calendar months hard labour. Judgment respited on defendant finding sureties, himself in 100*l.* and two sureties in 100*l.* each, conditioned to appear and render himself when called upon.

The Chairman, in summing up to the jury, after reading the whole evidence and making some remarks on the testimony of the different witnesses, told them that if they believed the account given by *Irving* of the matter they would find *Robert Watson* guilty.

1857.

WATSON'S
Case.

The Court therefore requests the opinion of the Court of Criminal Appeal whether the conviction can be supported.

This case was argued on 21st *November*, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., CROMPTON J. and CHANNELL B.

Bulwer appeared for the prisoner; no counsel appeared for the Crown.

Bulwer, for the prisoner. The question is raised on the three first counts of the indictment.

COCKBURN C. J.—How was it put to the jury? The aggregate of the pretences alleged in these counts may have induced the prosecutor to part with his money; but instead of being put into one count they are subdivided and split up. Each pretence forms the subject of a distinct and separate count, and in each count the money is alleged to have been obtained by the particular pretence mentioned therein; and as these pretences are all made in the course of one transaction it is difficult to say on which the jury believed the prosecutor acted.

Bulwer. The chairman, after reading the evidence and making some observations to the credit of the witnesses, told the jury that if they believed the account given by the prosecutor they would find the prisoner guilty on the three first counts.

CROMPTON J.—If the money was obtained by a mere fraud, and not received by the prisoner as a partner in the concern, the conviction might be right; but that question was not left to the jury.

Bulwer. The general effect of the evidence is that the prisoner exaggerated the nature and extent of the business, and thereby induced the prosecutor to enter into partnership with him; and this raises the question whether it can be said that the money which the prosecutor thereupon advanced to the capital of

the concern was obtained by the prisoner by false pretences. It is contended that there has been no obtaining of the money within the meaning of the statute, for the prosecutor did not part with the control over the money.

1857.

 WATSON'S
Case.

COCKBURN C. J.—If there was a partnership the prosecutor never parted with the money in the sense contemplated by the statute, for he still had a joint interest in it; and there certainly is a *prima facie* case of partnership.

CROMPTON J.—The question should have been put to the jury whether the representations of the prisoner were merely an exaggeration of the amount of business he was doing or a total fiction. I should be unwilling to hold that the mere exaggeration of the profits of a business by a seller is indictable.

Bulwer read some letters which were not inserted in the case, but which were admitted by *Dasent*, who was counsel for the prosecution at the sessions, and was now in Court, to have been given in evidence at the trial. The effect of the letters was to show that the prosecutor recognised and acted upon the partnership by endeavouring to dispose of his interest in the concern.

COCKBURN C. J.—The question submitted to us is, whether the jury, if they believed the evidence, were bound to find the prisoner guilty. We are of opinion that they were not, and consequently that this verdict cannot stand. It appears that the prosecutor, by certain representations made to him by the prisoner as to his business, customers, and profits, was induced to enter into partnership with the prisoner, and to advance the sum of 500*l.* as part of the capital of the concern. Now I am far from saying that where a party is induced by false pretences to enter into a partnership and to advance money, the allegations being altogether fraudulent and false, or colourable

1857.

WATSON'S
Case.

merely, he might not have ground for maintaining an indictment for obtaining the money by false pretences, or from saying that he might not rescind a contract obtained by fraud. But I am clearly of opinion, that if he does enter into the contract of partnership and does not rescind it, and advances money as part of the capital of the concern, he has not parted with his money within the meaning of the statute; because, being a partner, he is still interested in that money. Whether, in this case, Mr. *Irving* might or might not have rescinded this partnership is another question; but instead of doing so, he treated it as an existing partnership, advanced money as part of the capital, and afterwards endeavoured to dispose of his interest in the concern.

ERLE J.—I concur in the opinion expressed, and on the same grounds. I am obliged to conclude, upon the evidence before us, that there was a real partnership, which was assented to for some time by the prosecutor. I am not aware of any cases in which it is held that money advanced to a concern by one of the partners in it can be treated as money obtained by another partner by false pretences. I wish to guard myself against the notion, that in no case of a partnership obtained by fraud and money advanced, as where, for instance, the whole thing was a pretence, and the party always intended to obtain and appropriate the money, an indictment under the statute might not lie; and on the other hand, I would guard myself against being supposed to say that such an indictment could be sustained upon mere exaggerated representations as to the profits of a concern. I am aware of the difficulty of drawing the line; but, at all events, in this case there was no obtaining of the money within the meaning of the statute.

WILLIAMS J.—I am of the same opinion. The only point of law reserved for our consideration is, whether,

in every possible and conceivable view of the evidence by the jury, they were bound to return a verdict of guilty, and I think they were not. 1857.

— WATSON'S
Case.

CROMPTON J.—I quite agree with my brother *Williams*, that the question put to us is as he has stated it. No doubt other questions might have been raised in this case, but the direction to the jury was, that if they believed the evidence of *Irving* they must find the prisoner guilty. There were grave matters which might have been submitted to the jury. They might have been asked whether the defendant carried on any real trade; but, if the whole story of the trade was not a fiction, I should be strongly inclined to think a mere misrepresentation as to the number of barrels of beer sold would not be within the statute.

CHANNELL B.—I also think that this conviction cannot be sustained. There was evidence to show that there was a partnership, not repudiated but affirmed. Assuming there to be a partnership, the money was paid as part of the capital.

Conviction quashed.

REGINA v. WILLIAM CASTLE.

1857.

THE following case was reserved and stated by the Chairman of the Leicestershire Sessions.

At the General Quarter Sessions of the Peace holden for the county of *Leicester*, on the 19th day of *October* 1857, *William Castle* was indicted under the 9 & 10

A. was convicted, on an indictment framed upon section 57 of 9 & 10 *Vict.* c. 95., of feloniously causing to be

delivered to *T.C.* a certain paper falsely purporting to be a copy of a certain process of the County Court of *L.* The paper in question was headed "In the County Court of *L.* *A.* plaintiff and *T.C.* defendant," and was addressed to "*T.C.*, the above defendant," and gave him notice to produce, "on the trial of this cause," on a given day certain accounts and papers; and at the foot of the paper were the words, "By the plaintiff." Held, that the conviction was wrong, inasmuch as the paper did not purport to be a copy of a summons to witnesses, under section 85 of 9 & 10 *Vict.* c. 95., or of any other process of the County Court.

1857.
CASTLE'S
Case.

of Vict. c. 95. s. 57., for that he on the 12th day of *September* 1857 feloniously caused to be delivered to *Thomas Charles* a certain paper, falsely purporting to be a copy of a certain process of the County Court of *Leicestershire*, holden at *Melton Mowbray* in the county of *Leicester*, he the said *William Castle* well knowing the same to be false, against the form of the statute in such case made and provided, and against the peace of our said lady the Queen, her Crown and dignity; and was found guilty, subject to the following case.

There were several other counts, on which the prisoner was acquitted.

The paper mentioned in the indictment is annexed to this case, and marked A., and is to form part of it.

It was proved by *Ann Charles*, the wife of the prosecutor, and by *Caroline Charles* her daughter, who read to her the document and the direction &c. of the envelope in which it came (she herself being unable to read), that she was indebted to the prisoner, who resided at *Melton Mowbray*, in the county of *Leicester*, for three boxes of pills, amounting to ninepence, but that the prisoner had in fact, previously to her receipt of the letter, alleged that the sum of three shillings and fivepence halfpenny, as stated in the margin of the document, was the correct balance, after deducting three shillings admitted by him to have been paid. That in the early part of *September* she received by post at *Welby*, in the county of *Lincoln*, an envelope bearing the post marks of *Melton* and *Grantham*, which was the due course of post to her residence, the direction of which was in the prisoner's handwriting, as was also the document already set out, and which was enclosed. That she made inquiries in about a fortnight, and found it was not a Court paper.

Mr. Campion, the clerk to the County Court at

1857.

 CASTLE'S
Case.

Melton, gave evidence as follows:—I know the prisoner; he was a solicitor's clerk. I have searched my books for a plaint, "*Castle*, plaintiff, *Charles*, defendant;" there is no such plaint, nor ever has been. No such plaint on 2nd *September*, and none since. This paper resembles a process issued by us; it is called a Summons to Witness to produce Books, &c. It is the same as that mentioned in the Act as summons to witness. The balance is never inserted in the summons; there is no cause for it. If there had been such a plaint the sum would have been named. The words at the foot of the document "By the plt." mean plaintiff.

Cross-examined].—I am also clerk to the justices. When *Mrs. Charles* produced the document I knew it was not a summons from Court. *Mrs. Charles* sent the document to me by letter; upon that I opened it, and laid it before the justices. I said, it resembles a summons to witness. A mere summons to witness does not contain the words "You are requested to appear," &c. &c. &c. I have known a summons to go to a defendant to produce books, in case of *Adcock*, two years ago. It is not the usual practice for a party to give notice themselves to produce. To make a summons to witness to attend, it must have the seal of the Court. I mean to say the document produced purports to be a summons to witnesses;—such a paper is always signed by the registrar; it always contains these words, "In default of your attendance," &c. &c. I mean by purporting to be, that it resembles. The form runs in the commencement very like a true summons. I don't practice in County Court for plaintiff or defendant; in a superior Court I should give—or a paper similar to that would be given—a notice to produce.

Re-examined].—I still say it resembles a County

1857.
CASTLE'S
Case.

Court process. In any Court I should not give a notice to produce where no writ was issued. There was no cause in Court, the notice therefore was of no value. The 17th of *September* was a County Court day.

This was the case for the prosecution.

For the defence *William Pettit Dewes*, clerk to the County Court of *Ashby-de-la-Zouch*, in the same County Court district, was called, and deposed as follows:—I have had ten years experience in it. The document now produced does not resemble a summons to witnesses issued out of the Court. It differs in the commencement, also in the signature. It omits the penalty in default; also the number is omitted; also there is no seal; if issued by the Court it would have had a seal. The Christian names are omitted. It does resemble partly; it should say that such Court is holden, &c. We seldom issue a notice to produce; they are generally issued by the parties, except an attorney is concerned. It most resembles an ordinary notice to produce.

Cross-examined].—I should infer from the document that a plaint had been pending for 17th *September*. The seal is wanting. I keep the seal of the Court, and don't let it out. A paper falsely purporting to be a copy of summons or process could not have the seal of the Court.

It was then objected by the counsel for the prisoner :

1. That this particular count was bad for uncertainty (the contention as to the other counts and their proof is omitted).

2. That the document in question was not proved to purport, and did not in fact purport, to be a copy of a summons for witnesses to produce or of any other process of the County Court of *Leicestershire*, holden at *Melton Mowbray*.

3. That there was no evidence as to the actual form

of the process of which the document in question was alleged to purport to be a copy, or that any like process was used in the County Court, and that the actual form in use ought to have been produced, instead of oral evidence being given of its contents.

4. That there was no delivery, so as to give jurisdiction to the Court in *Leicestershire*.

I however declined to stop the case, and directed the jury that if they thought the prisoner had knowingly caused to be delivered this document, and had intended that the person receiving it should suppose it to be some genuine County Court process issued under the authority of the Court, and should thereby be induced to pay the sum mentioned in the margin, they might find him guilty; and I have therefore reserved the case for the opinion of the Court of Criminal Appeal.

If the Court shall be of opinion that upon any of the grounds contended for, or upon my direction to the jury, the conviction was wrong, the conviction to be quashed; if otherwise, affirmed. *Regina v. Evans*, 1 Dears. & Bell, 236; 7 Cox, C. C. 293.

Judgment on the conviction was postponed, and the prisoner was admitted to bail to appear and receive judgment.

Henry J. Hoskins,
Chairman.

A.

In the County Court of *Leicestershire*,
at *Melton Mowbray*.

Castle . . . plaintiff.
and

Charles . . . defendant.

1857.

CASTLE'S
Case.

1857.

CASTLE'S
Case.

Balance of account 3s. 5½d.

Take notice, that you are required to produce at the above Court, on the trial of this cause, on the 17th day of *September* instant, the several accounts and memorandums given to you, or to your wife, by the above plaintiff at various times. Dated this 2nd day of *September*, 1857.

By the plaintiff.

To Mr. *Thomas Charles*,
the above defendant.

This case was argued on 30th *November*, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., CROMPTON J. and CHANNELL B.

C. G. Merewether appeared for the Crown; no counsel appeared for the prisoner.

Merewether, for the Crown. The first objection on the part of the prisoner is, that the count on which he was convicted is bad for uncertainty. I contend that the count was good, because it followed the words of the statute; but that, at all events, it is good after verdict by virtue of 7 *Geo.* 4. c. 64. s. 21. (a).

The second objection is, that the document does not purport to be a copy of process of the County Court (b).

COCKBURN C. J.—What process do you say this purports to be a copy of? What is it more than a notice to produce which the party or his attorney may give?

Merewether. We say it purports to be a copy of a summons to witnesses under section 85 of the County Courts Act, 9 & 10 *Vict.* c. 95. (c).

(a) See *Regina v. Moss*, *antè*, p. 104.

(b) *Regina v. Evans*, *antè*, p. 236, was referred to; but that case was decided upon another branch of the section, which provides against

“acting under false colour or pretence of process.”

(c) That section enacts, that “either of the parties to the suit or any other proceeding under this Act, may obtain at the office

COCKBURN C. J.—That is an order of the Court, to be served by the bailiff. This is a notice to a party in the suit, and it is stated at the foot that it is sent by the plaintiff.

1857.

CASTLE'S
Case.

CROMPTON J.—This is not a summons to a witness, but a notice from one party in the suit to another, in effect informing him that if he does not produce certain documents he will give secondary evidence of their contents.

COCKBURN C. J.—This is a notice to produce in an imaginary case. The prisoner may have intended the paper to have a certain effect; but unless it imports to be a copy of process the conviction cannot be sustained. It is a notice to a defendant to produce certain documents, and that, if the notice is not complied with, secondary evidence may be given; and it does not purport to be any thing in the shape of process of the Court.

The other learned Judges concurred.

Conviction quashed.

of the clerk of the Court summonses to witnesses, to be served by one of the bailiffs of the Court, with or without a clause, requiring

the production of books, deeds, papers, and writings in their possession or control."

REGINA v. SAMUEL ESSEX.

1857.

THE following case was reserved by ERLE J. at the *Warwick* Summer Assizes 1857.

The prisoner, who was the clerk to a savings bank,

was convicted on an indictment charging him with embezzlement, the property being laid in *A. B.* In order to prove that *A. B.* was a trustee of the bank he was called as a witness, and stated that since the commission of the offence he had been acting as a trustee; but that before that date he had attended only one meeting, having on that occasion been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was done by him at that meeting which he might not have done as a manager. *Held*, that this was insufficient evidence of acting to support the inference of the legal appointment of *A. B.* as a trustee, and that the conviction was wrong.

1857.

ESSEX'S
Case.

The prisoner was indicted for embezzling, in 1842, money the property of *Hervey Wilmot Sitwell*, and it was proved that he, in the capacity of clerk to the *Rugby Savings Bank*, had received and embezzled money which was the property of the trustees of the bank, under 9 *Geo. 4. c. 92. s. 8*. There was no rule of the society, nor any statute regulating the mode in which trustees should be appointed, or the mode in which resolutions of meetings should be entered; and for the purpose of showing that Mr. *Hervey Wilmot Sitwell* was a trustee in 1842, the prosecutor relied upon evidence of acting as trustee, as to which Mr. *Sitwell* stated, that from 1843 he had been acting as a trustee, but before 1843 he had only attended meetings of trustees, and when he had so attended he had signed the Minute Book. The only entry to be found with his signature was for a meeting in 1835, and, as to that meeting, he stated that he had been requested by a Mr. *Parker*, who was acting as a trustee, to attend as a trustee lest there should be a deficiency of trustees, and that he had attended and signed the entry accordingly; that the prisoner was at that meeting and that the heading of the page containing the resolutions was in his handwriting. Mr. *Sitwell* did not express by the signature that he was a trustee or that he signed in that capacity. He did not do any act which trustees alone were capable of doing. All trustees and managers had an equal right to attend the meeting; there was nothing to shew that a meeting of managers only, without any trustee, would have been invalid, and Mr. *Sitwell*, as rector of a parish, was ex officio a manager. I held that acting as trustee was evidence of a legal appointment; and that Mr. *Sitwell's* statement, if believed, was evidence of his having acted as trustee in 1835, and I directed the jury that though it was extremely slight, it was sufficient to support the inference of

a legal appointment continuing in 1842, if they made it. 1857.

The jury convicted the prisoner, who was bailed, and I reserved the question for the opinion of this Court, whether there was sufficient evidence to support the direction and the conviction. W. ERLE.

ESSEX'S
Case.

This case was argued on 14th *November* 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., MARTIN B. and CHANNELL B.

Macaulay Q. C. (*Field* with him) appeared for the prisoner; no counsel appeared for the Crown.

Macaulay, for the prisoner. The question is whether the property is laid in the legal owners. Section 8 of statute 9 *Geo.* 4. c. 92. vests the property of the savings bank in trustees; then, was Mr. *Sitwell* shown to be a trustee? In the original rules of the bank the name of Mr. *Sitwell* did not appear, and on the only occasion on which he seems to have acted, he may have acted as manager and not as trustee.

COCKBURN C. J.—I think the whole evidence goes rather to show that he was not a trustee.

ERLE J.—I think the evidence insufficient to support the conviction.

MARTIN B.—I own, I think the evidence is, that he was not a trustee. Conviction quashed.

REGINA v. SAMUEL ESSEX.

1857.

THE following case was reserved by ERLE J. at the *Warwick* Summer Assizes, 1857.

The prisoner
was convicted
upon an
indictment

charging him with stealing a cheque. It was proved that the prisoner was clerk to a savings bank, and received the cheque from a manager of the bank upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. It was found that, according to the usual course of business, if a depositor could not attend at a proper time to receive the cheque it was handed to the prisoner as the agent of the depositor. *Held*, that the case was one of false pretences and not larceny, and that the conviction was wrong.

1857.

Essex's
Case.

The prisoner was convicted of stealing a cheque for 50*l.*, the property of *Hervey Wilmot Sitwell*, in 1847, and admitted to bail.

I reserved two questions for the consideration of this Court: 1st, was there evidence of the larceny? and 2ndly, was there evidence of the rules of the savings bank?

With respect to the first question, the evidence was, that the prisoner was clerk to the *Rugby Savings Bank*; that the course of business for drawing out money was this: the depositor gave a notice to the clerk of the amount required, and, if present on the next night of business, received a cheque for that amount from the manager in attendance, or, if absent, he allowed the clerk to receive such cheque and to get the cash for it, to be kept by him till called for, and the depositor and clerk signed the books of account usual in a savings bank. On the 25th *September*, 1847, the prisoner, as clerk, falsely pretended to *James Haylock*, the manager in attendance, that *Elizabeth Glaby*, a depositor, had given notice for 50*l.* and produced the usual entries, signed by himself, and as *Elizabeth Glaby* was not in attendance received from Mr. *Haylock* a cheque for 50*l.*, for which he afterwards obtained cash at the bank. *Elizabeth Glaby* had not given any notice or authority for drawing out 50*l.* or any sum, and the prisoner made the false pretence with the intention, from the beginning, of obtaining the cheque and appropriating it to his own use. In deciding this question, it must be assumed that Mr. *H. W. Sitwell* was a trustee of the savings bank. It was objected, for the prisoner, that these facts showed an obtaining of the cheque by a false pretence from Mr. *Haylock*, and not a larceny of a cheque the property of Mr. *Sitwell*. I overruled it, but reserved it for this Court.

With respect to the second question, a printed copy of the rules, with two names of trustees printed at the end, with a manuscript certificate of Mr. *Tidd Pratt* showing his approval of the rules subjoined, was tendered under 7 & 8 *Vict. c. 83. s. 19.* and 8 & 9 *Vict. c. 113. s. 1.*

It was objected that the copy tendered was not signed by two trustees within the meaning of those statutes, their names being printed and not in manuscript. I overruled the objection but reserved the point.

W. ERLE.

1857.

Essex's
Case.

This case was argued on the 14th *November*, 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., MARTIN B., and CHANNELL B.

Macaulay Q. C. (*Field* with him) appeared for the prisoner. No counsel appeared for the Crown.

Macaulay, for the prisoner. First, there was no evidence of larceny. The manager parted with the property in the cheque to the prisoner, not as a servant of the bank but as agent of the depositor.

COCKBURN C. J.—Can it be otherwise than the money of the bank until it reaches the hands of the depositor?

MARTIN B.—Is this anything more than the case of a clerk receiving money from his principal to hand over to a creditor?

Macaulay. The intention of the manager was to deliver the cheque to the prisoner as the agent of the depositor, so that, as between the manager and the depositor, the manager paid the depositor by the hands of the prisoner.

ERLE J.—The evidence was, that the manager treated the prisoner as agent of the depositor, and handed the check to him as payment to the depositor.

MARTIN B.—The intention of the manager seems

1857. to me immaterial. The prisoner was the clerk to the

ESSEX'S bank, and I see nothing to make him the agent of the
Case. depositor.

COCKBURN C. J.—The question seems to be, whether the money in the hands of the clerk was money in the hands of the bank or in the hands of the depositor.

Macaulay. That is so, and I contend that it was money in the hands of the depositor.

The argument on the second question raised in the case is omitted, as the judgment of the Court did not proceed upon it. *Cur. adv. vult.*

On the 21st *November*, 1857, at the sitting of the Court, ERLE J. said, that he would amend the case by inserting the statement that, according to the course of business, the cheque was handed to the prisoner as agent of the depositor.

COCKBURN C. J.—When that amendment has been made, the difficulty which suggests itself will be removed, and we shall probably feel bound to quash the conviction.

The judgment of the Court was delivered, on 30th *November* 1857, by

COCKBURN C. J.—This case has been amended by my brother ERLE, and upon the facts, as amended, there really is no case left to be argued, for it must now be taken that the prisoner received the cheque, which he afterwards cashed, as the agent of the depositor, and not as the agent of his employers, the managers of the savings bank, and therefore he could not be charged with stealing the moneys of the bank.

ERLE J.—I am clearly of that opinion. The case was an important one, and I heard it through; but I was always of opinion that this was a fatal objection.

Conviction quashed.

THOMAS MANSELL *v.* THE QUEEN.—In Error. 1857.

THE plaintiff, in error, was tried before BRAMWELL The prisoner, B., at the Winter Assizes 1856, and convicted on an who was convicted of murder,

brought error on the judgment. The record set out an award of venire to the sheriff which required him to impanel and return a jury "of good and lawful men of the county," and then proceeded to state that the sheriff, for the purpose aforesaid, impanelled and returned certain persons and arrayed them in one panel; but the sheriff's return did not state that the persons so impanelled were good and lawful men of the county.

The panel contained fifty-four names. Eighteen, when called, were peremptorily challenged by the prisoner; one came not; fifteen were, on the prayer of the counsel for the Crown (the prisoner's counsel objecting and praying that cause of challenge should be shown), ordered to stand by; and nine were elected and tried to be sworn. There were only twelve other persons on the panel and they were at that time absent deliberating upon their verdict in another case. The name of *W. I.* (one of the persons so ordered to stand by and being the first who was so ordered on the prayer of the Crown) was then again called, and the counsel for the Crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner prayed that the cause of challenge should be shown forthwith. Thereupon, and before any judgment was given, the twelve persons who sat as a jury in the other case came into Court and gave their verdict; and the counsel for the Crown then prayed that *W. I.* should be ordered to stand by until such twelve persons should be called; but the counsel for the prisoner demanded that *W. I.* should be sworn unless cause of challenge were shown. The Court ordered that *W. I.* should stand by; and three persons (being the number required to complete the jury) were taken from the said twelve jurors, and elected and tried to be sworn, although the prisoner's counsel objected that such persons ought to be called in their proper order with other persons in the panel, and that *J. J.*, the person whose name stood in the panel immediately after that of *W. I.*, ought to be next called.

J. P., one of the said three last mentioned jurors, then, without being sworn, said, that he had conscientious scruples against capital punishments; and thereupon the counsel for the Crown prayed that he should be ordered to stand by. The counsel for the prisoner prayed that the Crown should show cause of challenge. The Judge then told *J. P.*, that if he felt that he could not do his duty he had better withdraw; the said *J. P.* then withdrew himself, and thereupon it was ordered by the Court that he should stand by. Several others out of the said twelve jurors were then, on the prayer of the Crown, ordered to stand by; one was peremptorily challenged by the prisoner, and another was then elected and tried to be sworn in the place of the said *J. P.*, thus completing the jury of twelve by whom the prisoner was tried.

Held, by the Court of Queen's Bench and affirmed by the Court of Exchequer Chamber, 1. That by reasonable intendment the record showed that the persons named in the panel were good and lawful men of the county.

2. That the statement in the record that the Court ordered jurymen to stand by meant, that the jurymen being challenged by the Crown the consideration of such challenge was postponed till it should be seen whether a full jury could be made without them; but that, if the expression that jurymen should stand by had no legal meaning, error could not be assigned upon it.

3. That notwithstanding the statute 33 *Edw.* 1. st. 4. (re-enacted by 6 *Geo.* 4. c. 50. s. 29.) the Crown need not show cause of challenge till the whole panel be gone through, and it appears there will not be a full jury without the persons challenged.

4. That the panel is not to be considered as gone through, so as to require the Crown

1857. indictment charging him with the wilful murder of
 MANSELL'S *Alexander M'Burnie*, and thereupon judgment of
 Case. death was passed upon him. On this judgment the
 prisoner brought error.

The record set out the commission of the Judges, —the presentment of an indictment charging that the plaintiff, in error, on the 27th day of *August*, 1856, at the parish of *Hougham*, in the county of *Kent*, feloniously, wilfully and of his malice aforethought, did kill and murder one *Alexander M'Burnie*,—the prisoner's plea of not guilty,—the award of the *venire* to the sheriff to have before the justices a jury of “good and lawful men of the county aforesaid, according to law, by whom the truth of the matter may be better known ;” and then proceeded,—“And the sheriff, for the purpose aforesaid, impanels and

to assign cause of challenge, until the panel is not only once called over but exhausted ; that is until, according to the usual practice of the Court and what may reasonably be expected, the fact is ascertained that there are no more jurors in the panel whose attendance may be procured ; and, therefore, that *W. I.* was properly ordered to stand by the second time, and the three persons then required to complete the jury were properly taken from the twelve persons who, having sat upon another case, came into Court before the formation of the jury was completed.

5. That it is not necessary that the names of the jurors should be called over in the order in which they stand on the panel, and that course may be departed from when convenience requires ; that the order in which the names were called in this case was convenient, and did not become illegal from having been suggested by the counsel for the Crown.

6. That the Court (without attaching any weight to what the said *J. P.* had said) was bound, on the prayer of the counsel for the Crown, to order him to stand by, as he was in fact challenged by the Crown without assigning cause, and the challenge was not too late.

Semble, by the Court of Queen's Bench and by the Court of Exchequer Chamber, that there may be cases in which it would be the duty of the Court, even where there is no challenge or objection, either by the Crown or the prisoner, to excuse a jurymen on the panel when he is called, or to order him to withdraw if he is palpably unfit to perform his duty, through physical or mental infirmity.

Held, by the Court of Exchequer Chamber, that where a person convicted of felony brings error from the Court of Queen's Bench to the Exchequer Chamber, the general rules for governing the proceedings in error in civil cases under the Reg. Gen. of H. T., 4 *Wm.* 4., and under the Common Law Procedure Act, do not apply ; but the prisoner must be brought up to the Court of Exchequer Chamber and must there pray over of the record and assign errors by delivering them in writing to the officer of that Court and must be present during the argument and the delivery of the judgment ; and that the Attorney General or the counsel representing him for the Crown may, immediately on the assignment of errors being so delivered, orally join in error.

Quare, by the Court of Exchequer Chamber, whether the objections taken were matter of error.

returns the persons following, and arrays them in one panel in the order following, that is to say." Then follow the names on the jury panel, being in number fifty-five, and amongst them were the names of all the persons hereinafter mentioned as having been called. It then stated that seventeen of the persons impannelled, being severally and successively called in the order in which their names appeared in the panel, were severally and successively peremptorily challenged by the prisoner; that the three persons next called came and were elected and tried to the intent that they should be sworn upon the jury; that one came not, and that another was peremptorily challenged by the prisoner. The record then proceeded thus:—"And the said *William Ironmonger* being next called comes, and hereupon *William Ribton* Esquire, barrister-at-law, who prosecutes for our lady the Queen in this behalf, on behalf of our said lady the Queen prays the Court here that the said *William Ironmonger* may be ordered to stand by; and the said *Thomas Mansell*, by *Francis Russell* Esquire, barrister-at-law, his counsel, prays the Court here that if our said lady the Queen challenge the said *William Ironmonger* she so challenge forthwith, and that the cause of such challenge may be shown to the Court here forthwith, and before any other person in the said panel be called, and saith that by the laws of this realm the said *William Ironmonger* ought not to be ordered to stand by; and hereupon it is considered and adjudged and ordered by the Court here that the said *William Ironmonger* do stand by." The record then stated that the person on the panel who was next called came and was elected and tried to be sworn; that *Jacob Jacobs* being next called, the counsel for the Crown prayed that he might be ordered to stand by; that the same objection was

1857.

 MANSELL'S
Case.

1857.

MANSELL'S
Case.

made by the counsel for the prisoner as in the case of *William Ironmonger*, and thereupon it was ordered that the said *Jacob Jacobs* do stand by; that another person on the panel was next called came and was elected and tried to be sworn; that two others were then called, and the counsel for the Crown prayed that they respectively might be ordered to stand by; that the same objection as last aforesaid was taken by the counsel for the prisoner, and thereupon it was ordered that such two last mentioned persons do stand by; that the person on the panel who was next called came and was elected and tried to be sworn; that another person on the panel was next called, and the counsel for the Crown prayed that he might be ordered to stand by; that the same objection as last aforesaid was taken by the counsel for the prisoner, and thereupon it was ordered that the said last mentioned person do stand by; that the person on the panel who was next called came and was elected and tried to be sworn; that seven other persons on the panel were then called, and the counsel for the Crown prayed that they respectively might be ordered to stand by; that the same objection as last aforesaid was taken by the counsel for the prisoner, and thereupon it was ordered that the said last mentioned seven persons and each of them do stand by; that the person on the panel who was next called came and was elected and tried to be sworn; that three other persons on the panel were then called, and the counsel for the Crown prayed that they respectively might be ordered to stand by; that the same objection as last aforesaid was taken by the counsel for the prisoner, and thereupon it was ordered that the last mentioned three persons and each of them do stand by; and that the person on the panel who was next called came and was elected and tried to be

sworn. The record then proceeded thus:—"And forasmuch as the remainder of the said several persons so impannelled and returned as aforesaid are a jury sworn and charged by the Court here to give their verdict upon a certain indictment for felony, at the suit of our said lady the Queen, against one *George Chapman* a prisoner in the gaol here, and during the whole time when the several other persons so impannelled were being called, have been and still are absent from the Court here, having been committed to the custody of the sheriff by the Court here, to be by him safely kept until they shall have given their said verdict, therefore the said remainder of such persons are not now called; and hereupon the said *William Ironmonger* is again called as he before was called and again appears, and the said *William Ribton*, on the part of our said lady the Queen, prays the Court here that the said *William Ironmonger* be again ordered to stand by; and the said *Thomas Mansell*, by his counsel aforesaid, prays the Court here that if our said lady the Queen challenge the said *William Ironmonger*, cause of such challenge be forthwith shown to the Court here, and before any other of the persons whose names appear upon the said panel be called, and saith that by the laws of this realm the said *William Ironmonger* ought not to be ordered to stand by again; and thereupon the said" (naming twelve), "being the jury before mentioned, sworn and charged to deliver a verdict on the said indictment against the said *George Chapman*, come into Court here and give their verdict on the said last mentioned indictment, and are forthwith discharged from the custody of the said sheriff; and hereupon the said *William Ribton*, on behalf of our said lady the Queen, prays the Court here that the said *William Ironmonger* be ordered to stand by until the said several jurors hereinbefore lastly mentioned

1857.

MANSELL'S
Case.

1857.

MANSELL'S
Case.

shall have been called to serve on the said jury between our said lady the Queen and the said *Thomas Mansell*; and the said *Thomas Mansell*, by his counsel aforesaid, denies that by the laws of this realm the said *William Ironmonger* ought to be thus ordered to stand by, and demands that, in default of our said lady the Queen forthwith challenging and assigning good cause of challenge against the said *William Ironmonger*, the said *William Ironmonger* may be elected and sworn upon the jury to try the premises in the said inquisition against the said *Thomas Mansell* specified; and hereupon it is considered, adjudged and ordered by the Court here that the said *William Ironmonger* do stand by accordingly; and thereupon the said *William Ribton*, on behalf of our said lady the Queen, prays the Court here that the residue of the said several persons so impannelled and returned as aforesaid, and who have not yet been called to serve on the said jury between our said lady the Queen and the said *Thomas Mansell*, to wit, the said jurors so discharged from the custody of the said sheriff as aforesaid, be forthwith called; and the said *Thomas Mansell*, by his counsel aforesaid, denies that by the laws of this realm any of the said several last mentioned persons can or ought to be called forthwith; and saith that by the laws of this realm such persons ought to be called in their proper order with other persons in the said panel and not otherwise; and saith the said *Jacob Jacobs* is the next person in such order and ought to be called next in order after the said *William Ironmonger*; and hereupon *Isaac Perry*, *Jabez Phillpott* and *William Parton* are now next called and come, and together with the said" (naming the nine persons previously tried and elected to be sworn as aforesaid) "are elected and tried to the intent that they should be sworn to speak the truth of and concerning the premises in the said indictment

against the said *Thomas Mansell* specified ; and hereupon the said *Jabez Philpott*, without being sworn, says, that he has conscientious scruples against capital punishments ; and hereupon the said *William Ribton*, on behalf of our said lady the Queen, prays the Court here that the said *Jabez Philpott* be ordered to stand by ; and the said *Thomas Mansell*, by his counsel aforesaid, prays the Court here that if our said lady the Queen challenge the said *Jabez Philpott*, cause of such challenge be shown forthwith, and before any other person whose name appears on the said panel be called ; and hereupon the learned Judge says, ‘ Undoubtedly, if you feel you cannot do your duty, you are quite right in saying so, and had better withdraw ;’ and hereupon the said *Jabez Philpott* withdraws himself from the rest of his fellows aforesaid ; and hereupon it is considered and adjudged and ordered by the Court here, that the said *Jabez Philpott* do stand by, notwithstanding that the said *Thomas Mansell*, by the said *Francis Russell*, his counsel aforesaid, denies that the said *Jabez Philpott*, having been so called and elected as aforesaid, by the laws of this realm can or ought to be ordered to stand by as aforesaid ; and demands that, in default of our said lady the Queen forthwith challenging and proving good cause of challenge against the said *Jabez Philpott*, the said *Jabez Philpott* may be sworn as a juror.” The record then stated, that six other persons on the panel were then called, and the counsel for the Crown prayed that they respectively might be ordered to stand by ; that the same objection was taken by the counsel for the prisoner as in the case of *William Ironmonger*, and thereupon it was ordered that the said last mentioned six persons and each of them do stand by ; that the person next called was peremptorily challenged by the prisoner. The record then proceeded thus :—“And hereupon the said *William*

1857.

MANSELL'S
Case.

1857. *George Larkin* is called and comes, and is elected and tried to the intent that he shall be sworn as aforesaid in the place and stead of the said *Jabez Philpott*; and hereupon the said *William George Larkin* and the jurors aforesaid, before elected and tried, save and except the said *Jabez Philpott*, are by the Court here in due form of law sworn to speak the truth of and concerning the premises in the last mentioned indictment specified; the said *Thomas Mansell*, by his counsel aforesaid, protesting that the said jury has been elected contrary to the laws of this realm, and that in default of our said lady the Queen assigning good cause of challenge against the said *William Ironmonger*, the said *Jabez Philpott* and the said several other persons so ordered to stand by as aforesaid, the said jury ought not to be sworn as aforesaid; and hereupon it is considered and adjudged by the Court here, that our said lady the Queen ought not to be compelled and be not compelled to assign any cause of challenge against the said *William Ironmonger*, the said *Jabez Philpott*, or any of the said last mentioned several persons."

The record then set out the verdict of guilty and the judgment of death.

In *Easter Term*, 1857, *F. Russell* moved, in the Court of Queen's Bench, for a writ of *habeas corpus* to bring up the prisoner for the purpose of assigning errors upon the record, which was granted as a motion of course; and on 24th *April* the prisoner was brought into Court in the custody of the keeper of *Maidstone* gaol. *F. Russell* thereupon prayedoyer of the record of the indictment, which was taken as read. He then begged leave to assign errors, which, being granted, he handed in an assignment of errors signed by him. The errors assigned were as follows:

1. That the record does not show any sufficient ground why the said *William Ironmonger* and the

other persons when they had severally been called and had appeared (or so many of them as were necessary to complete the number of the jury) were not elected and sworn as jurymen to try the issue between the said *Thomas Mansell* and the Queen.

1857.

MANSELL'S
Case.

2. That when each of the said last mentioned jurors was called and had come, the said *William Ribton* prayed on behalf of our said lady the Queen that the juror might be ordered to stand by; and also with respect to each of them that it was considered and adjudged, and ordered by the Court that he do stand by; whereas by the law of this realm of *England* the Court had no power to order the said last mentioned jurors or any of them to stand by; as an order that a juror do stand by is an order not known to the law, and is vague and indefinite, and uncertain in its meaning, and that at any rate the said Court had no jurisdiction to order any of the said jurors to stand by until he had been challenged on the part of our lady the Queen, even though our lady the Queen might not be bound to show the cause of such challenge forthwith, or had been challenged on the part of the said *Thomas Mansell*.

3. That the names of all the jurors on the said panel were called in order from the first to the last, omitting only the names of the twelve who formed the jury on another charge of felony, and who were out of Court, in the custody of the sheriff, considering their verdict during all the time that the panel was being gone through, and until after the said *Thomas Mansell* had objected to the said *William Ironmonger* being ordered to stand by a second time; that when the last name on the panel had been called, and the panel had thus been gone through, only nine jurymen had appeared excepting those who had been peremptorily challenged or ordered to stand by; that the panel was begun to be gone through again by the calling the said *William*

1857.

MANSELL'S
Case.

Ironmonger a second time; that the said *William Ironmonger* a second time appeared, and the said *William Ribton* again prayed that the said *William Ironmonger* might be ordered to stand by, and the said *Thomas Mansell* again objected thereto; that the Court a second time ordered the said *William Ironmonger* to stand by, although no cause of challenge was alleged or proved against him, and the said *William Ironmonger* was not sworn as a juror to try the issue between the said *Thomas Mansell* and the Queen; whereas, by the law of the land, the said *William Ironmonger* ought on his second appearance to have been elected and sworn as a juror; for, although our lady the Queen may have the privilege of setting aside a juror for a time without assigning cause of challenge, there is no such privilege after the panel has been gone through, and the panel in this case had been gone through in law, as all the jurors who could at the time lawfully appear and act as jurors had been called before the said *William Ironmonger* was called the second time.

4. That after the said *William Ironmonger* was the second time ordered to stand by, the said *William Ribton* prayed the Court that the twelve jurors who were out of Court in the custody of the sheriff when the panel was first gone through should be called before any other jurors on the said panel, and that *Isaac Perry*, being one of the said last mentioned jurors, was called next after the said *William Ironmonger*, notwithstanding the said *Thomas Mansell* objected that *Jacob Jacobs* ought next to be called; whereas, by the law of the land, the jurors ought not to be called out of their regular order at the nomination of the counsel for our lady the Queen; but the names of the jurors ought to be called in the order in which they stand upon the panel, beginning at the top, and the name of the juror next in the panel

below that of the said *William Ironmonger* ought to have been called next after that of the said *William Ironmonger*, instead of that of *Isaac Perry*, whose name stood higher on the panel than that of *William Ironmonger*.

1857.

 MANSELL'S
Case.

5. That after the said *Jabez Philpott* had been elected and tried to the intent that he should be sworn to try the issue between the said *Thomas Mansell* and the Queen, the said *Jabez Philpott* stated that he had conscientious scruples against capital punishments; that thereupon he was, on the application of the said *William Ribton*, ordered by the Court to stand by; whereas, by the law of the land, after a juror has once been elected as a juryman, he cannot be challenged or ordered to stand by; and whereas, by the law of the land, the entertaining conscientious scruples against capital punishments is no ground of challenge or for directing a juror to stand by, and the Court had no jurisdiction to tell the said *Jabez Philpott* he had better withdraw, or to order him to stand by until it was proved on oath, and had been found by triers duly chosen and sworn, that the said *Jabez Philpott* was not indifferent between our lady the Queen and the said *Thomas Mansell*.

6. That it did not appear that the jurors who were elected and tried to try the issue between the said *Thomas Mansell* and our said lady the Queen were sworn in due course according to law.

7. That the matters contained in the record are not sufficient in law to warrant the judgment given against the said *Thomas Mansell*.

8. That judgment was given for our said lady the Queen and against the said *Thomas Mansell*; whereas, by the law of this realm of *England*, judgment ought to have been given in favour of the said *Thomas Mansell* and against our said lady the Queen.

1857.

MANSELL'S
Case.

And the said *Thomas Mansell* prayed judgment, &c.

A similar course to that taken on the indictment was then taken with respect to the record on the coroner's inquisition.

F. Russell then prayed the Court to assign counsel for the prisoner, and the Court thereupon assigned the counsel named in a paper handed up by the prisoner, namely, *F. Russell* and the Hon. *G. Denman*. *Welsby* then joined in error on the part of the Crown, and the Court appointed 2nd *May* for the argument.

The points for argument on behalf of the Crown were: 1. That the record disclosed sufficient grounds why the persons mentioned in the 1st assignment of error were not elected or sworn. 2. That the prayer of counsel for the Crown, that each of the said persons might be ordered to stand by, amounted in law to a peremptory challenge, and that the Crown was not bound to show cause. 3. That under the circumstances mentioned in the 3rd assignment of error, the panel had not been gone through in law when the said *William Ironmonger* was a second time ordered to stand by. 4. That the twelve jurors who had been out of Court had been properly called. 5. That the prayer of counsel for the Crown that *Jabez Philpott* might be ordered to stand by amounted in law to a peremptory challenge, and that the Crown was not bound to show cause. 6. That the Court had jurisdiction to tell the said *Jabez Philpott* that he had better withdraw, and that the said *Jabez Philpott* having thereupon withdrawn himself from his fellows, it was properly ordered by the Court that he should stand by. 7. That it sufficiently appeared that the jurors who were elected and tried, and did try the issue, were sworn in due course according to law. 8. That the matters in the record were sufficient to

warrant the judgment, and that judgment was rightly given for the Crown. 1857.

MANSELL'S
Case.

The case was argued in the Court of Queen's Bench (the plaintiff in error being present) on the 2nd of *May*, 1857, before LORD CAMPBELL C. J., WIGHTMAN J., ERLE J. and CROMPTON J.

F. Russell (with him the Hon. *George Denman*) appeared for the plaintiff in error, and *Welsby* (with him *Ribton*) for the Crown.

F. Russell, for the plaintiff in error. It is error on the record if a challenge be improperly allowed, or if any of the jurors are improperly set aside or prevented from being sworn. *Rex v. Edmonds and Others* (a), *Grey v. The Queen in Error* (b).

LORD CAMPBELL C. J.—Do you admit that there was no irregularity till *Ironmonger* was called ?

F. Russell. When *Ironmonger* was first called the power possessed by the Crown was not properly exercised. There was no right of peremptory challenge, and certainly no right to require that the juror should stand by ; but at all events when *Ironmonger* was called a second time he ought to have been sworn, because the panel had then been gone through and all the available jurors had been called.

In early times the right of peremptory challenge was usurped by the Crown ; but since the statute 33 *Edw.* 1. s. 4., the Crown can only challenge for cause. The words of the statute are,—“ An ordinance for inquests: he that challengeth a jury or juror for the king, shall show his cause.”—“ Of inquests to be taken before any of the justices and wherein our lord the king is party howsoever it be ; it is agreed and ordained by the king and all his counsel that from henceforth, notwithstanding it be alleged by them that sue for the king, that the jurors of those inquests

(a) 4 B. & Ald. 471.

(b) 11 Cl. & Fin. 427.

1857.

MANSELL'S
Case.

or some of them be not indifferent for the king, yet such inquests shall not remain untaken for that cause; but if they that sue for the king will challenge any of those jurors they shall assign of their challenge a cause certain; and the truth of the same challenge shall be inquired of according to the custom of the Court; and let it be proceeded to the taking of the same inquisitions, as it shall be found, if the challenges be true, or not, after the discretion of justices." Although this statute has been repealed, it was reenacted nearly in the same words by the statute 6 Geo. 4. c. 50. s. 29.; to which latter statute the decisions on the statute of *Edward* 1st will therefore apply. The earliest authority appears to be *Staundford's P. C.* lib. 3. cap. 7, fo. 162-3, where it is said: "By the statute of *Edward* 1st, the king need not challenge without cause; but this cause he need not show immediately upon his challenge, but he must show it when he has perused the panel." This view of the effect of the statute is adopted in 2 *Hale P. C.* 271, referring to *Staundford*; *Anon. (a)*; *Co. Lit.* 156 b; 2 *Inst.* 431; 2 *Reeves Hist. Law*, 82, 98; *Lord Campbell's Lives of the Chancellors*, 160, 165.

Although this construction of the statute was several times strongly contended against (b), there is no doubt the practice has grown up of the Crown delaying to show cause until the panel has been perused or gone through; but when that has been done the Crown must show cause of challenge: 2 *Hale P. C.* c. 36, p. 271; 2 *Hawk. P. C.*, by *Curwood*, b. 2. c. 43, s. 3, p. 569; 4 *Bl. Com.* 353; *Anon. (c)*; *Fitzharris's Case (d)*; *Lord Preston's Case (e)*; *Lord Grey of Werk's Case (f)*.

(a) 1 *Anders.* 299, Case, 307.(b) See the argument of Mr. *Scott*, 26 *How. St. Tr.* 1231.(c) 1 *Ventr.* 309.(d) 8 *How. St. Tr.* 335.(e) 12 *Ibid.* 675.(f) 9 *Ibid.* 127; *S. C.* Sir T. *Raym.* 473; *Skin.* 81.

In *Regina v. Geach* (a) Parke B. says, "The Crown may challenge without showing cause till the panel is gone through, and if there is not a full jury they must show cause."

1857.
MANSELL'S
Case.

The question then is, what is the meaning of the words "panel perused"? No doubt they bear the same meaning in criminal as in civil cases; 2 *Hale P. C.* c. 36; and in practice in civil cases, the panel is considered as perused or gone through when the names have been once called over, and before the clerk of assize commences to call over the panel the second time; *Fitz. G. A.* tit. *Challenge*, fol. 174 a, pl. 81, referring, it would seem, to *Year Book*, 7 *Hen.* 4., 41; *Finch's Law*, bk. 4., ch. 36., p. 413., citing 27 *Hen.* 8., 26., or more probably 27 *Hen.* 8., 2., referred to in *Brooke's Abridg.* tit. *Challenge*, pl. 2; *Co. Lit.* 158 a; 21 *Vin. Abr.* tit. *Trial* (L. d.) 275., pl. 14; 3 *Bacon's Abr. Juries* (E.), 10. 763.

There are many authorities to show that in criminal proceedings the panel has been gone through or perused, and the right of the Crown to challenge without assigning cause ceases, when all the available jurors have been called or disposed of; *Count Coningsmark's Case* (b); *Spencer Cowper's Case* (c); *O'Coigly's Case* (d); *Horne Tooke's Case* (e); *Regina v. Cropper* (f); *Regina v. Geach* (g); *Regina v. Blake-man* (h); 2 *Hale P. C.* 274.

In the present case the panel was, in fact and in law, gone through. The twelve, who had been elected and sworn to try another case, were not only absent by the order of the Court, but were actually locked up in the custody of the sheriff; and cannot

(a) 9 Car. & P. 500.

(b) 9 How. St. Tr 11.

(c) 13 Ibid. 1108.

(d) 26 Ibid. 1231, 1243.

(e) 25 Ibid. 25.

(f) 2 Moo. C. C. 18, 20.

(g) 9 Car. & P. 501.

(h) 3 Car. & K. 97.

1857.
MANSELL'S
Case.

be considered as available jurors. They were in the same situation as jurors excused or exempted from serving ; for they would in fact have been committing an offence if they had come into Court ; nor can it make any difference that they came in before the actual decision of the Judge on *Ironmonger* being challenged the second time. The issue must be decided upon the state of things at the time when it was raised ; and at that time the clerk of assize had actually begun to go through the panel again. Suppose the twelve jurors had not come into Court at all, when would the panel have been gone through ? If the power of the Crown to challenge without cause had not then ceased, it is difficult to say under what state of circumstances it could be said to have expired.

But even if the Crown had at that time a right to challenge without assigning cause, that right was not duly exercised ; for the order that a jurymen shall stand by is indefinite and uncertain, and not warranted by law. The phrase is borrowed from the practice in *Ireland*, but it is insensible and is not known in *English* law. The word challenge is the technical word and ought to have been used. A juror when called must, unless formally challenged, serve on the jury. The word challenge is a word of art. The learned counsel referred to the form of challenge in *Rex v. Badcock* (a) ; *The Great Precedent Book* in the Crown office ; a form of challenge, 2 *Gude's P. C.* 194 ; and to *Joyon Confessions and Challenges*, 146, n. a.

I further contend that, even assuming the panel not to have been perused when the twelve jurors, who had been serving on the other jury, returned into Court, the names of the jurors ought to have been called in their order on the panel.

(a) 2 *Gude's Cr. Pr.* 193.

CROMPTON J.—But is an alleged irregularity like this ground of error?

1857.

MANSELL'S
Case.

Russell. In *Anon.* (a) it is said, “One jurymán appeared in Court, and when he came to the bar to be sworn he informed the Court that he was eighty years old and prayed to be discharged; and the Court could not grant it nor pass him by and swear others without committing error, except the parties would consent; for it is error to skip a juror who is returned if he appear.” Here the twelve jurors were, at the instance of the Crown, called consecutively from different parts of the panel; instead of the ordinary course being pursued: 2 *Hale P. C.* c. 36, 274, citing *Warton’s Case* (b); *Rex v. Johnson* (c); *Regina v. Frost* (d); *Regina v. Smith O’Brien* (e); *Regina v. Geach* (f); *Regina v. Blakeman* (g).

I also contend that *Jabez Philpott*, who had been elected and tried to the intent that he should be sworn, ought not to have been told to withdraw or ordered to stand by on his stating that he had conscientious scruples against capital punishment. First: if it is contended that *Philpott* was challenged, the challenge was not in time.

LORD CAMPBELL C. J.—A juror may be challenged by the prisoner before he is sworn; and the prosecutor has the same right.

Russell. In *Ganden and Symmon’s Case* (h) it is said, that where a juror is not challenged by one party who had sufficient cause of challenge and afterwards is challenged by the other side, and afterwards the party doth release his challenge, in that case the first party cannot challenge the same juror again, “because

(a) Brownlow & Gold. 41.

lin, 1849.

(b) Yelv. 23.

(f) 9 Car. & P. 501.

(c) 2 Strange, 1000.

(g) 3 Car. & K. 97.

(d) 9 Car. & P. 135-6.

(h) Godbolt, 234.

(e) Reported by Hodges, Dub-

1857. he did foreslow his time of challenge; and he had admitted the party for to be indifferent at the first :”
 MANSELL'S
 Case. 12 *Vin. Abr.* tit. *Trial* (L. d.), pl. 14. 275.

Secondly: If the challenge was in time and it was a challenge for cause, it was not properly tried.

LORD CAMPBELL C. J.—The counsel for the Crown did not adopt it as a cause of challenge.

CROMPTON J.—It was the order of the Judge that *Philpott* should stand by until the rest of the panel was gone through.

Russell. Supposing it to be an act of the Judge; it was not warranted by law. The power of a Court under a commission of oyer and terminer, is not co-extensive with that of this Court: 4 *Inst.* ch. 33. 185.

LORD CAMPBELL C. J.—There is no difference between the power of commissioners of oyer and terminer on the trial of felonies and the power of this high Criminal Court.

Russell. The question of incompetency ought to be tried by triers. The law has entrusted this jurisdiction, not to the Judge, but to a jury: 2 *Hale P. C.* 274; *Finch's Law*, bk. 4., ch. 36., p. 413.

The conscientious scruples of a juror are no objection to his serving, unless the objection is taken by one of the parties: *Brunt's Case* (a).

A jury might not have found that *Philpott* would not be an indifferent juror; nor was there in fact anything before the Court to justify such a finding. The fact that a man has conscientious scruples against capital punishment is not a good cause for challenge, nor is it a known ground of excuse.

There remains the technical point, that it is not stated in the record that the jurors are good and lawful men of the county.

Semble, per *Patteson J.*, that this objection is fatal :
Whitehead v. The Queen in Error (a).

1857.

 MANSELL'S
 Case.

Welsby, for the Crown. Assuming that a writ of error lies on this judgment for the unlawful allowance of a challenge by the Crown, the prisoner has only a right to be tried by a jury of good and lawful men of the county returned on the panel, no lawful challenge being disallowed. *Ironmonger's* is the only important case, and it is clear that the counsel for the Crown was not bound to show cause for his challenge in that case ; since the practice is completely settled that the Crown is not bound to show cause of challenge till the panel is completely gone through and exhausted.

I contend, first, that there was no judgment of the Court on which a writ of error will lie ; and, secondly, that if there was a judicial decision, that decision was right.

First : There was a challenge by the Crown and a protest by the prisoner that the challenge ought not to be allowed without showing cause. The juror was then ordered to stand by ; but there was no judgment on which error will lie.

Secondly : Supposing that error will lie, the panel had not been gone through. The test is, was the panel exhausted up to the time when the person came to the book to be sworn ? It cannot appear that the inquest will remain not taken until all the panel qualified to serve are disposed of. How can this case differ from one where a juror is absent when called ? Suppose the list had been begun again, twelve jurors having been absent when their names were called, there is a challenge a second time by the Crown and a joinder in challenge, and it is then found that the twelve are in Court ; their being then called would be no ground of error. *Peter Cooke's Case* (b) is a

(a) 7 Q. B. Rep. 582.

(b) See the judgment, *post*, p. 403.

1857.

MANSELL'S
Case.

decision upon this point, and shows that *Ironmonger* was properly ordered to stand by, a sufficient number of other jurors in the panel being then in Court ready to be sworn; and the calling the first of the twelve was only a beginning to go through the defaulters.

As to the objection that the jurors were elected; being "elected tried and sworn" is only one act, and is not complete till the juror is sworn.

The order that a juryman do stand by is well known and was well understood at the trial; and means, according to the practice in *Ireland*, that a juror shall stand by, on the prayer of the counsel for the Crown, until the time when it becomes incumbent on the Crown to show cause of challenge.

As to the order in which the jurors were called, the prisoner has not the right to have the names in the panel called in any particular order; the order in which the names shall be called is a matter of practice, and it is a practice which the Judge has the power to regulate.

LORD CAMPBELL C. J.—If, as in *Frost's Case*, the panel is alphabetical, it would be unjust to say that the names should be called in that order.

Welsby. The *Anonymous Case*, cited from *Brownlow & Gold*. 41., is not to be found in *Cro. Jac.*; nor in any other cotemporary report, and is not law.

LORD CAMPBELL C. J.—That is certainly a very alarming case, and if it were law would very much impede the administration of the criminal law of the country.

Welsby. In *Philpott's Case* the challenge was in time, as it was before he came to the book to be sworn. The Judge was justified in ordering him to withdraw. In *Brunt's Case* (a) there was no moral or other objection to the juror who desired to be excused.

(a) 33 How. St. Tr. 1177.

In a very recent trial (*a*), on a juryman saying that he had formed an opinion on the case, Lord CAMPBELL told him that he had better withdraw. Here the Judge did not, on *Philpott's* statement, peremptorily exclude him from the jury; and even if there be no counsel on either side and no objection is made, the Judge has the power to order an improper juror to withdraw. But there was a challenge by the Crown, and upon that the Court properly ordered *Philpott* to stand by, the time not having arrived when the Crown could be called upon to show cause of challenge.

1857.

 MANSELL'S
 Case.

The objection that it is not stated on the record that the jurors were good and lawful men of the county cannot prevail, because reading the return of the sheriff with the award of the *venire*, it will be presumed by the Court that the sheriff did his duty, and returned and impanelled good and lawful men of the county.

F. Russell, in reply. It is admitted that the improper allowance of a challenge is error. Here a peremptory challenge was allowed without cause being shown after the panel was perused. If the panel was not perused and gone through when *Ironmonger* was called a second time, it is not shown by the Crown at what time or under what circumstances it could be said to be gone through.

Cur. adv. vult.

On *Wednesday*, 6th *May* 1857, the judgment of the Court was delivered by

LORD CAMPBELL C. J.—Having anxiously considered this case, and examined all the authorities cited during the argument at the bar, we have all come to the conclusion that none of the errors assigned can be

(*a*) *Regna v. Palmer* (for murder), Central Criminal Court, 1856.

1857.

MANSELL'S
Case.

supported,—the prisoner having been convicted and sentenced to death, after a fair trial according to the laws of *England*. Our judgment chiefly depends upon the right construction of the ancient statute 33rd of *Ed.* 1st entitled “An ordinance for inquests,” which was re-enacted by the 6th of *Geo.* 4. c. 50. An abuse had arisen in the administration of justice by the Crown assuming an unlimited right of challenging jurors without assigning cause, whereby “inquests remained untaken.” In this way the Crown could, in an arbitrary manner, on every criminal trial challenge so many of the jurors returned on the panel by the sheriff that twelve did not remain to make a jury, and the trial might be indefinitely postponed *pro defectu juratorum*, to the great oppression of the subject, and in contravention of the words of *Magna Charta*, “*Nulli deferemus justitiam vel rectum.*” The remedy was to give to the party accused a right to be tried by the jurors summoned upon his arraignment if, after the limited number of challenges to which he was entitled without cause assigned, there remained twelve jurors of those returned upon the panel to whose qualification and unindifferency no specific objection, to be proved by legal evidence, could be made. To prevent the trial going off for want of jurors by the peremptory challenges of the Crown, it is enacted that “they who sue for the Crown shall assign of their challenge a cause certain, and the truth of the same challenge shall be inquired of according to the custom of the Court.” But there was no intention of taking away all power of peremptory challenge from the Crown while that power, to the number of thirty-five, was left to the prisoner. Indeed, unless this power were given, under certain restrictions, to both sides, it is quite obvious that justice could not be satisfactorily

administered; for it must often happen that a juror is returned on the panel who does not stand indifferent and who is not fit to serve on the trial, although no legal evidence could be adduced to prove his unfitness. The object of the statute is fully attained if the Crown be prevented from exercising its power of peremptory challenge so as to make the trial go off while there are twelve of those returned upon the panel who cannot be proved to be liable to a valid objection. Accordingly the course has invariably been, from the passing of the statute to the present time, to permit the Crown to challenge without cause till the panel has been called over and exhausted, and then to call over the names of the jurors peremptorily challenged by the Crown, and to put the Crown to assign cause, so that if twelve of those upon the panel remain as to whom no just cause of objection can be assigned the trial may proceed. In our books of authority the rule is laid down that "the King need not show any cause of his challenge till the whole panel be gone through and it appear that there will not be a full jury without the person so challenged." This rule (with a view probably of conveying to the bystanders the notion that it operates harshly against the prisoner) has often been questioned, but it has as often been recognised and established by the presiding judges. The last instance of this was on the trial of *John Frost* for high treason in the year 1840, when Lord Chief Justice *Tindal*, the presiding judge, without calling upon the counsel for the Crown for an answer, observed, "We are called upon, after a construction has been put upon this act of Parliament from the very period when it was passed in the 33rd of *Edward I.* down to the present time, to put a different construction upon it. Where would be the certainty of the law of *England*, and what certainty

1857.

 MANSELL'S
Case.

1857. would there be for prisoners as well as for the public,
MANSELL'S if Judges acting according to their own discretion,
Case. neglecting those rules of interpretation which wise men before them have laid down, and which have been sanctioned by invariable usage, were to do that for the first time which we are now called upon to do—namely, to put a construction different from that which has been put by all who have gone before us? It appears, however, to me that upon the language of the act itself it is by no means an unfair or improper conclusion to say that the Crown is not to be called upon to challenge for cause until the panel has been gone through.” PARKE B. and WILLIAMS J., the associated Judges, clearly concurred in this opinion. We may further observe that as the statute of *Edward I.* was re-enacted *in ipsissimis verbis* after this construction had so long been put upon it, this construction must be considered to have the sanction of the Legislature; and indeed there is no reason to suppose that it has ever worked injustice. Therefore the first ground of error assigned, that there were jurors ordered to stand by on the application of the counsel for the prosecution without any cause being assigned, entirely fails; and no objection can be taken to the regularity of the proceedings till the panel had been once gone through without a jury being formed. What was then the state of things according to the record, and what was then done? Twelve of the jurors returned upon the panel were at that time shut up deliberating upon their verdict in the case of *George Chapman*, and their names had not been called. Thereupon the name of *William Ironmonger*, who had been before challenged by the Crown without cause being assigned, was again called, and, being again challenged by the Crown, the prisoner’s counsel prayed that the Crown might now be put to assign

cause, and that otherwise *William Ironmonger* should not be ordered to stand by. At this moment, before any judgment was given by the Court, the twelve jurors who had sat as the jury upon *Chapman* came into Court, and gave their verdict, and were discharged. They being now in Court, and the formation of the jury in *Mansell's* case being in progress, the counsel for the Crown prayed that *William Ironmonger* should be ordered to stand by until the twelve who had served in *Chapman's* case should be called to serve on the jury between the Queen and *Thomas Mansell*. This was objected to by the counsel for the prisoner, who prayed that *William Ironmonger* should be sworn upon this jury unless cause of challenge were forthwith assigned by the Crown. The Court adjudged that *William Ironmonger* should stand by, and further that the names of the jurors who so came into Court should then be called instead of the name of *Jacob Jacobs*, who stood in the panel next after *William Ironmonger*. The counsel for the prisoner argued before us that all these proceedings subsequent to the calling of the name of *William Ironmonger* the second time were erroneous. To decide upon his objections we must consider what is the meaning of "*going through or perusing the panel*," according to the rule laid down upon this subject. If it be that when the panel has been once called over no jurors who did not answer to their names, and who were then absent, can be afterwards called and considered as jurors on the panel, although they immediately afterwards come into Court before any other step in the proceeding is perfected, the plaintiff in error would be entitled to succeed, for we do not attach any importance to the fact that the names of the twelve jurors on *Chapman's* jury were not called in going over the panel when they were

1857.

MANSELL'S
Case.

1857. shut up in the custody of the sheriff, But this seems
MANSELL'S a very narrow construction of the rule ; it would lead
Case. to very inconvenient consequences, and it is not at all
necessary for the object which the statute had in view.
Suppose that a juror is absent from Court for some
temporary purpose when his name is called, and he
returns into Court immediately after the last name
on the panel has been called, and offers to serve, and,
being unobjectionable, he would make up a jury of
twelve, is he to be rejected, and is the list of those
before challenged by the Crown to be again resorted
to, so that the Crown may be put to assign cause of
challenge ? According to the modern practice of
having at the assizes one panel of jurors both for civil
and criminal trials, and having two criminal Courts
sitting at the same time, it can hardly ever be expected
that all the jurors on the panel should answer to their
names or be in Court at the same time when the
names on the panel are called over ; and the Crown
would often be entirely deprived of the limited right
of challenging without cause, preserved to it for the
due administration of justice, if, when the panel has
once been called over, the obligation of challenging
for cause the jurors ordered to stand by were imme-
diately to arise. But we are of opinion that the panel
is not to be considered as "*gone through*," so as to
require the Crown to assign cause of challenge, till it
is *exhausted*,—i. e. till, according to the usual practice
of the Court and what may reasonably be done, the
fact is ascertained that there are no more of the jurors
on the panel whose attendance may be procured, and
that, without requiring the Crown to assign cause of
challenge, the trial could not proceed. In the present
case the panel had not been exhausted, although once
called over, and the twelve jurors who had served on
Chapman's jury came into Court when only nine jurors

had been elected and sworn for *Mansell's* jury, and when the remaining three might be taken from these twelve as conveniently and as much for the advantage of the prisoner as if they had all been in Court and had answered to their names when the panel was first called over. In none of the cases referred to by the prisoner's counsel do we find any thing to differ from this view of the subject. No doubt it may be assumed, *primâ facie*, that all the jurors in the panel are in Court when the panel is called over, and if, when it has been once called over, there is not a full jury made, the usual course would be immediately to call the names over again, and to put the Crown upon assigning cause of challenge; the language used by the judges on these occasions is in reference to this supposition, that all were in Court and answered to their names; but there is no decision nor *dictum* to the effect that the panel may not be called over again, with a view to see whether there may not be some of the jurors in the panel who may have come into Court, and who may make up a full jury, without putting the Crown to assign cause of challenge. It is always understood that the peremptory challenges of the Crown shall not put off the trial nor admit a supplemental panel of jurors to be returned by the sheriff. But, taking care to treat as jurors who may serve on the jury only those who are returned on the original panel, there is nothing to show that they are not to be deemed for all purposes on the panel if they appear and are ready to be sworn before the formation of the jury is completed. Neither in *Koningsmark's Case*, nor in *O'Coigley's Case*, nor in *Horne Tooke's Case* does any thing occur to countenance the doctrine now contended for on behalf of the prisoner. In *Spencer Cowper's Case*, Baron *Hatsell* does intimate an opinion that, under the circumstances there stated, the Crown

1857.

 MANSELL'S
Case.

1857. ought to show cause of challenge, but that was after

MANSELL'S
Case.

it had been ascertained that a full jury could not be made out from the panel by reason of the peremptory challenges of the prosecutor, and there can be no doubt that under such circumstances cause of challenge must be assigned. Chief reliance was placed on *Regina v. Geach*, 9 Car. & Payne, 499. But there *Parke B.*, who presided, laid down the well known rule. "The Crown may challenge without showing cause till the panel is gone through, and if there is not a full jury they must show cause." It turning out after once calling over the whole panel that there was not a full jury, the learned Judge says, "The proper course will be to call the panel over in the same order as before, calling those who did not answer before, and omitting to call those who have been peremptorily challenged by the prisoner." Nothing more was decided or said which can be considered applicable to the present case, the description which follows being merely as to what is a good cause of challenge. Now, there can be no doubt that the course pointed out by the learned Judge was, under the circumstances, the proper course, but is there any reason to suppose that if, after the panel had been once called over, and before any further step had been taken for the formation of the jury, jurors on the panel who had been called and did not at first answer had come into Court in sufficient number to make a full jury they would have been rejected, and the Crown would have been put to assign cause for its challenges? Mr. *Welsby* brought to our notice one instance since the revolution of 1688, and therefore to be respected, in which, upon a trial for high treason, it was decided by a Judge of great eminence and high character that, after the panel had been once called over, it might be called over again with a view to procure the attendance of jurors who had not been

in Court when it was first called over. In the *State Trials*, vol. 13, p. 317, we find the following dialogue recorded as having occurred during the trial of *Peter Cook*.

1857.

 MANSELL'S
Case.

“ *Clerk of Arraignment*.—My Lord, we have gone through the panel, we must now call the defaulters again,

“ *Thomas Clark*.

“ *Clark*.—Here.

“ *Sir B. Shower*.—Was he here when he was called over?

“ *Attorney General*.—That is nothing ; he is here now.

“ *Sir B. Shower*.—But if there be a default of the jury, and the King’s counsel have challenged any one, they ought to show their cause ; therefore we desire that they may show their cause why they challenged Mr. *Simmons*.

“ Lord Chief Justice TREBY.—The King has power to challenge without showing cause till the panel be gone through, but if there be a default of jurors when the King challenges the King’s counsel must show cause.

“ *Sir B. Shower*.—There is a default of jurors, my Lord.

“ Lord Chief Justice TREBY.—Nobody is recorded absolutely a defaulter if he comes in time to be sworn.”

So Mr. *Clark* was sworn, instead of the King being obliged to show cause for challenging Mr. *Simmons*. This, therefore, is an authority expressly in point, to show that *William Ironmonger* was properly ordered to stand by, other jurors in the panel being ready to be sworn in sufficient numbers to make up a full jury without him. Mr. *Russell* dwelt much on a supposed vested interest that the prisoner had acquired in

1857.

MANSELL'S
Case.

William Ironmonger as one of the jury to try him, unless cause could be shown by the Crown to prove that he did not stand indifferent. But in truth, and according to law, there is no necessity nor right that a prisoner shall be tried by a particular jurymen till the prisoner has been given in charge to the jury. After the prisoners have had their challenges, the oath of the jurymen is, "You shall well and truly try, and a true deliverance make, between our sovereign lady the Queen and the several prisoners *you shall have in charge.*" When the prisoner is given in charge to the jury, by that jury he must be tried, and in felony or treason the jury cannot separate till they have found their verdict. But (as often happens at the assizes) before a particular prisoner who has had his challenges is given in charge to the jury the Court rises and the jury separate. Next morning a new jury is called, when the prisoner again has his challenges, and possibly there may not be one individual upon the second jury that was sworn upon the first. Yet all this is regular. We now come to the assignment of error respecting *Jabez Philpott*. The facts, as gathered from the record, are that he was allowed to go into the jury-box with intent that he should be sworn and serve as a jurymen, without any objection being made to him on either side. Then, before being sworn, he spontaneously said that "he had conscientious scruples against capital punishments." The counsel for the Crown, without assigning this as cause of challenge, simply prayed the Court that *Jabez Philpott* should be ordered to stand by. The prisoner's counsel prayed that the Crown should show cause of challenge. The presiding Judge said, "Undoubtedly, if you feel that you cannot do your duty, you are quite right in saying so, and you had better withdraw." *Jabez Philpott* then withdrew, and thereupon it was "adjudged and

ordered by the Court that *Jabez Philpott* should stand by." It is contended that this was erroneous, and that the Court was bound to order *Jabez Philpott* to be sworn upon the jury. But we are of opinion that the Court was bound, on the prayer of the counsel for the Crown, to order him to stand by. We here attach no weight to what *Jabez Philpott* said, and we consider this a challenge by the Crown without assigning cause, the panel not yet being exhausted, and there being a probability that a full jury might be made up without swearing this individual. Nor do we attach any weight to the remark which fell from the learned Judge, although it be unnecessarily set out upon the record. But we wish it to be understood that we by no means acquiesce in the doctrine boldly contended for at the bar, on the authority of *Brownlow* (41), that a Judge, on the trial of a criminal case, has no authority, if there be no challenge either by the Crown or by the prisoner, to excuse a juryman on the panel when he is called, or to order him to withdraw, although he is palpably unfit, by physical or mental infirmity, to do his duty in the jury-box. We are not now to define the limits of this authority; but we cannot doubt there may be cases, as if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible for him to continue in the jury-box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relative that he could not duly attend to the evidence, in which, although, from there being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting

1857.

MANSELL'S
Case.

1857.

MANSELL'S
Case.

such a juryman to be sworn, and to join in a verdict on the life or death of a fellow-creature. We have now to attend to some objections of mere form, which it is said afford sufficient ground for reversing the judgment. Exception is taken to the expression in the record that the Court ordered and adjudged jurymen "to stand by,"—said to be language unknown to the law. The meaning of it, however, is quite obvious—namely, that, being challenged by the Crown, the consideration of the challenge should be postponed till it should be seen whether a full jury might not be made without them by others on the panel. No authority has been cited to show that "challenge" is a *vox signata* which must be used like "feloniously," or "burglariously," or "of malice aforethought;" and if the expression conveys no legal meaning error cannot be assigned upon it. Another objection pointed out by the prisoner's counsel was, that the record states that *Jabez Philpott* had been "called and elected to the intent that he should be sworn" before the prayer on behalf of the Crown that he should stand by. But he had not been sworn, and the statement can only mean that he had been allowed to enter the box that he might be sworn and serve upon the jury, if, when he came to the book to be sworn, and before he was sworn, no objection should be made to him. There can be no doubt that at this time he might have been challenged by the prisoner, and the record shows that the prisoner's counsel required that cause of challenge should then be shown against him by the Crown. If he could then have been challenged for cause by the Crown, what reason can there be for saying that he could not then be challenged by the Crown without cause, there being still several jurors present who had not been challenged either by the Crown or the prisoner, from

1857.

MANSELL'S
Case.

whom a full jury might be made? Then it was objected that the record does not show that the jurors named in the panel were "good and lawful men of the county of *Kent*," and the case of *Whitehead v. The Queen* (7 Q. B. 582) was cited, in which *Patterson J.* expressed an opinion that the caption of an indictment was bad for not showing that the indictment was found by good and lawful men of the county; but, whether that opinion be right or wrong, in the present case by reasonable intendment the jurors must be taken to have been good and lawful *Kentish* men. The award of the *venire* to the sheriff of *Kent* requires him "to have before the Queen's justices good and lawful men of the county aforesaid qualified according to law, by whom the truth of the matter may be better known." The record then goes on to allege that "the said sheriff, for the purpose aforesaid, impanels and returns the persons following, and arrays them in a panel" &c. He professes to obey the mandate he has received, and we must presume that he has done his duty and has obeyed it. We do not think it necessary to take further notice of the objection deduced from the supposed want of power in a commissioner under a commission of oyer and terminer and general gaol delivery, to do what might be done by the Court of Queen's Bench, than to say that, although in various matters the Court of Queen's Bench has powers which do not belong to commissioners of oyer and terminer and general gaol delivery, the statute in question must receive the same construction before all Courts and all Judges, and a party accused must have the same rights when on trial for his life before whatever Court or Judge he may be tried. We have only further to notice the objection that the names in

1857.

MANSELL'S
Case.

the panel, after it had been gone through once, were not read in the order in which they stood in the panel, the twelve jurors who had served on the trial of *Chapman* standing in different parts of the panel, and being now called over consecutively, instead of the clerk of assize calling the name of *Jacob Jacobs*, which stood immediately after that of *William Ironmonger*. There are sayings to be found in the books that the proper course is to call the names of the jurors as they stand in the panel, but there is no authority for asserting that this course may not be departed from when convenience requires; and if the jurors who had served on *Chapman's* jury were to be called at all, the convenient course clearly was to call them immediately and consecutively, as all the others had been before called, and had been either sworn or challenged. At *Frost's* trial for high treason the counsel for the prisoner objected to the jurors being called in the order in which they stood in the panel. When they are impanelled in alphabetical order it seems absurd to require that on each trial the clerk of assize must begin with the "A's."; and if a second jury is called it is difficult to say in what order, according to the rule contended for, the names ought to be called, so as to avoid the risk of the judgment being reversed upon a writ of error. There was here an additional *gravamen*, that the order in which the names were read was suggested by the counsel for the Crown. But if the order was in itself unobjectionable, it could not become illegal from having been suggested either on behalf of the Crown or the prisoner. Having thus travelled through all the alleged errors assigned on this record, and found that none of them can be supported in point of law, we have only to give

Judgment for the Crown.

WHEN the above judgment had been delivered the senior puisne Judge present, 1857.

MANSELL'S
Case.

WIGHTMAN J. addressed the prisoner, and ordered that the keeper of the gaol of *Newgate*, in whose custody the prisoner then was, should deliver him into the custody of the sheriff of the county of *Kent* and the keeper of her Majesty's gaol there, and that the said sheriff of *Kent* should execute the sentence of death upon the prisoner on *Monday* the 18th day of *May*.

Subsequently a writ of error was issued on the fiat of the Attorney General at the instance of the prisoner, to bring before the Court of Exchequer Chamber the judgment of the Court of Queen's Bench. A Judge at chambers granted a *habeas corpus* to bring the prisoner up to assign errors, and the prisoner appeared in Court for that purpose on the 13th *June*, 1857, in the custody of the gaoler of *Maidstone* gaol.

F. Russell, counsel for the prisoner, then proposed to assign errors; but, as no intimation had been given to the counsel for the Crown, it was suggested by the Court and assented to by the prisoner's counsel that the prisoner should be brought up on the following *Monday*, the 15th *June*, for that purpose. The Court thereupon ordered the gaoler to take the prisoner back to *Maidstone* gaol and to bring him up to Court on that day. The prisoner was accordingly brought up on 15th *June*, 1857.

F. Russell, for the plaintiff in error. A question arises as to the proper mode of assigning errors in this Court in a case of felony. There is no precedent, and the rules of practice prescribed for civil actions do not apply. The recent practice, under the Com-

1857.

MANSELL'S
Case.

mon Law Procedure Acts, is limited to actions at law; and it is submitted that the provisions as to error in the General Rules of *Hilary* Term, 4 *Wm.* 4., are limited in like manner, and do not apply to cases of felony.

COCKBURN C. J.—We are all of opinion that the rules of practice in question do not apply to proceedings on writs of error in cases of felony.

F. Russell. I submit that the proper course is that the prisoner being now present in Court, his counsel should pray oyer of the record; that the prisoner should then personally deliver in the assignment of errors in writing to the Master of the Court in open court to be filed,—thus following, as nearly as may be, the practice of the Court of Queen's Bench.

Welsby, who appeared on behalf of the *Attorney General* for the Crown, said there was no objection to the course proposed.

COCKBURN C. J.—The course suggested seems the proper one.

F. Russell then produced the writ of error, and prayed oyer of the record, which was granted, and the record was taken as read. The assignment of errors was then handed in. It was substantially the same as that in the Court below, with the following additional ground of error (namely):—

“That it does not appear by the record that the sheriff returned good and lawful men of the county of *Kent* to try the issue between the said *Thomas Mansell* and our lady the Queen” (*a*).

The Court, on the prayer of *F. Russell*, assigned counsel for the plaintiff in error.

Welsby, on behalf of the Crown, joined in error *vivâ voce*.

(a) Although this ground of error was not included in the assignment of errors in the Court below, the

point was there argued and decided against the plaintiff in error.

The Court then appointed a day for argument, and ordered that the keeper of *Maidstone* gaol should bring the plaintiff in error before the Court on that day; and the case was accordingly argued in the Court of Exchequer Chamber on 23rd and 24th *June* 1857 (the plaintiff in error being present), before COCKBURN C. J., WILLIAMS J., WILLES J., BRAMWELL B., WATSON B. and CHANNELL B.

1857.

MANSELL'S
Case.

F. Russell (with him the Hon. *George Denman*) appeared for the plaintiff in error; and *Welsby* (with him *Ribton*) for the Crown.

F. Russell, for the plaintiff in error. Jurors have been improperly set aside at the instance of the Crown, and the prisoner was not allowed to have those sworn on the jury on whose serving he was entitled by law to insist. This is properly on the record and is good ground for error. Improperly allowing or disallowing a challenge to a juror is error; *Rex v. Edmunds* (a), *Year Book*, 2 *Hen.* 4, pp. 2, 3: whether it be to the polls or to the panel; *Gray v. Regina* (b), *O'Connell's Case* (c): and if a juror, who has been challenged, try the case afterwards on a new *distringas*, it is error; *Moor v. Vaughan* (d). The result of the authorities seems to show that if it appear on the record that by any conduct of the Judge contrary to law the constitution of the jury has been altered to the prejudice of the prisoner, it is error on the record; *Vin. Abr.* tit. Error, 2 *Tidd's Prac.* 921, 13 *Godb.* 429. Although the question here raised is not expressly in the form of a demurrer, it was treated as a demurrer in the Court below, and it is so in substance. It would be monstrous to common sense to affirm that where it is admitted that there has been an improper selection of the jury, the prisoner shall have no remedy; and

(a) 4 B. & Ald. 471.

(b) 11 Cl. & F. 427.

(c) 11 Cl. & F. 156.

(d) Cro. Eliz. 430.

1857. if it is not ground of error there is no remedy, as a bill of exceptions will not lie in a case of felony (a).
 MANSELL'S Case.

The first and main objection is that when *William Ironmonger* was called a second time he ought not to have been set aside unless good cause was shown, as the panel had been then gone through and the right of the Crown to challenge without showing cause had ceased (b). The right of the prisoner that cause shall be shown is not a right dependent on the discretion of the Court, but is an absolute statutable right. There is no recital in the statute of *Edward I.* and the object of that statute must therefore, in a great measure, be gathered from the enactment itself; but we must take into consideration the mischief which the statute was intended to remedy. The statute was passed, not only to prevent delay in taking the inquisition but also to prevent the right of peremptory challenge on the part of the Crown. Previously to the establishment of the great charter our Kings had been kept under no rules of government, but had exercised a prerogative above the law; and the object was to put a restraint upon the royal power.

COCKBURN C. J.—I do not quite see what consequence follows.

(a) But it appears that it lies in misdemeanor; see *Jervis's Arch.*, by Welsby, 12th ed. 143, and the cases there cited; *Sir Henry Vane's Case*, 1 Sid. 85; 1 Keble, 324; 1 Lev. 68; Kelyng, 15; *Rex v Lord Paget*, 1 Leon. 85; *Rex v. Higgins*, 1 Vent. 366; *Rex v. Nutt*, 1 Barnard. 307; *Rex v. Preston*, Rep. temp. Hard. 251; 2 Str. 1040; and *Reg. v. Alleyne*, Q. B. Dec. 1851 (M.S. *Jervis's Arch.*, by Welsby, 12th ed. 143), in which Lord CAMPBELL, after argument at

Chambers, sealed a bill of exceptions in a case in which the defendant was indicted for obtaining money by false pretences and for a conspiracy to defraud.

(b) The cases cited were the same as in the Court of Queen's Bench, and therefore it has not been thought necessary again to refer to them; and the arguments of the learned counsel on this point are only given where they appear to add to or explain his contention in the Court below.

Russell. If you see that power had been usurped by the Crown, and that it was to remedy this evil that the statute was passed, you will then construe the statute strictly against the Crown.

No doubt, notwithstanding the intention of the statute, a practice grew up of allowing the Crown to defer showing cause of challenge till the panel had been gone through; but according to that practice, as shown by the reported cases, the panel had been gone through when *Ironmonger* was called a second time. The Crown must show cause, after all the available jurors have been called, if there is not then a full jury. Here all the available jurors had been called. The calling the names of the twelve jurors who came after *Ironmonger* was called a second time, cannot be said to have been calling over the names of defaulters, for those twelve jurors were not defaulters, but were in the situation of persons who were at the time exempted from serving on the jury; the record shows that there was no necessity for sending into the other Court or taking any measure to ascertain if they could be found; for it was known that they were engaged in the performance of a duty which devolved upon them as jurors, and therefore as to them the panel had been gone through; and if so it follows that, before *Ironmonger* was a second time ordered to stand by, every available juror had been called, and the panel had been treated as gone through by beginning to call it again. There is no case in the books by which it appears that a juror who has been once set aside at the instance of the Crown has been again set aside without cause of challenge being shown (*a*).

1857.

 MANSELL'S
Case.

(*a*) The arguments of the learned counsel on the other points were substantially the same as in the

Court below and are therefore omitted.

1857. *Welsby*, for the Crown. At the root of the argu-

MANSELL'S
Case.

ment on the other side there is this difficulty, that the record does not disclose any ground of error.

COCKBURN C. J.—The objection here is, that the Crown was allowed to challenge and pass over a jurymen and go on to the next juror without showing cause. How is this to be taken advantage of if not in error?

Welsby. If done corruptly by the Judge the course is impeachment. If not, there is no remedy unless there is a demurrer and judgment thereon.

WILLES J. referred to *The King v. City of Worcester* (a), in which it is said, that “if a Judge overrule a challenge upon debate without a demurrer then it is proper for a bill of exceptions.”

WILLIAMS J.—Suppose the Judge would only allow nineteen peremptory challenges by the prisoner?

Welsby. *Gray v. The Queen* is substantially that case; but there there was a formal demurrer and judgment. All that appears on this record is a challenge by the Crown and a protest by the prisoner that the challenge ought not to be allowed unless cause forthwith shown. If there was, by mistake, a departure from the practice of the Court, there is no redress; but if what is done wrongly is also done corruptly, the Judge is liable to impeachment.

COCKBURN C. J.—If a bill of exceptions does not lie in a criminal case, what is to prevent error being brought? I understand your proposition to be, that unless there be a judgment on the challenge on the record, no irregularity, however gross, in the conduct of the trial, is matter of error.

Welsby. Yes. If there be misdirection or improper reception of evidence in a criminal case it is not matter of error.

(a) *Skinner*, 101.

COCKBURN C. J.—Suppose eleven jurymen tried the case without consent?

1857.

MANSELL'S
Case.

Welsby. That would properly appear on the record, and would be matter of error.

COCKBURN C. J.—Here a challenge is allowed without showing cause, and that is put on the record.

Welsby. That never ought to have found its way on to the record. It is doubtful whether error would lie on the improper allowance of a challenge; but this does not even amount to an improper allowance. The Judge has only given time to the Crown to shew cause of challenge, by ordering the jurymen to stand aside till the panel has been gone through (a).

F. Russell replied.

COCKBURN C. J.—I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. It has been contended, on behalf of the Crown, that the objections taken were grounds of exception, and that a writ of error does not lie; but it is unnecessary to decide that question, because I think that the judgment of the Court below must be affirmed on the merits; and although it may be doubtful whether error will lie, I am unwilling to decide that question, because I for one would be loth to abridge the rights of a prisoner who may have been prejudiced at his trial. The first objection arises in this way. It appears that the list of jurors was gone through and certain persons were challenged by the Crown and by the prisoner; that this having been done twelve persons on the panel, who had been serving as jurymen in another case, came into Court after the list had been so gone through, and the name of *William Ironmonger* (who had, on the first calling over,

(a) The arguments on the other points were substantially the same as in the Court below.

1857. been ordered to stand by at the instance of the Crown)

MANSELL'S
Case.

had been called again, and after he had been again challenged by the Crown ; and then, instead of disposing of that challenge and deciding whether *William Ironmonger* should serve on the jury, the Judge allowed the names of the said twelve jurors to be called ; and the question is, whether the Crown ought not then to have been put to show cause of challenge. The question turns upon the statute 33 *Edward I.*, which, although repealed, has been re-enacted by section 29 of the statute 6 *Geo. 4*, c. 50. Before the statute of *Edw.*, the Crown exercised, either by legal prerogative or by usurpation, the power of peremptory challenge ; but the statute restrained that right, and took away the right of challenge on the part of the Crown without showing cause.

It appears that on that statute became engrafted the practice of allowing the challenge and directing the person challenged to be put on one side till the panel should be gone through, and if there were sufficient jurors without him it then became unnecessary to show cause of challenge. This, no doubt, amounted virtually in many cases to a peremptory challenge.

I think the books show that this practice was not at first confined to the Crown, but that the prisoner had the same right ; and in *Fitzharris's Case* the observations of the Chief Justice seem to show that the accused had the same right of deferring showing cause as the prosecutor. It is conceded on all the authorities that where the Crown proposes to challenge, the counsel for the Crown has a right to have the juryman objected to set on one side till the panel is gone through, and it is not till the panel is thus gone through that cause need be shown ; and the whole question resolves itself into this—when is

the panel gone through or perused? When the jurors on the panel have been called over, or when every legitimate effort has been made to ascertain if the attendance of jurymen can be secured? In this case the panel had been gone through once, and *William Ironmonger* had been challenged and set on one side. On calling over the panel the names of twelve jurymen were omitted, because, as they were serving upon another jury, it would have been an idle ceremony to call them; the result was, that when they came to the end of the panel there were not sufficient persons to serve on the jury. The panel having been thus called over, the name of *William Ironmonger* was again called, and the counsel for the Crown prayed that he might be ordered to stand by. The Judge did not decide upon that application; but, whilst the question was pending, the twelve jurymen who had been absent came into Court. It is not disputed that those twelve jurors were competent to sit upon the jury; but it is said that the panel having been previously gone through, the cause of challenge ought to have been stated. It all turns upon what is meant by going through the panel. The practice seems to vary. In some places it occurs that the names in the panel are called in the order in which they stand; in others the order is decided by ballot. Here they were called in their order on the panel; but the twelve absent jurymen were not called, because it was known where they were, and that it would be useless to call them. The panel then was not gone through so far as those twelve jurors were concerned—it was not exhausted as to them. Now, it being conceded that the Crown was not bound to assign cause of challenge till the panel was gone through, it seems to me that it cannot be said that the panel was gone through till those twelve jury-

1857.

MANSELL'S
Case.

1857.
 MANSELL'S
 Case.

men had been called, and the Crown and the prisoner respectively had said whether they challenged them or not. It is said that the challenge of *Ironmonger* ought to have been disposed of. Had that been disposed of there would have been more difficulty; but I think that even if that challenge had been disposed of the panel would not have been gone through as to the twelve jurors. But on looking at what took place, it is clear that the challenge was not gone into; the Judge heard what was said, but made no order, and then the twelve came in. Independently of the convenience of the course pursued in this instance, there is authority to support it. In *Horne Tooke's Case* it was assented to that after the panel had been gone through the names of the defaulters should be gone through again before the Crown should be required to show cause of challenge; and virtually that was what was done in the present case, for the absent jurors stand in the position of those whose names were called, but who did not answer. True, it is said that in *Regina v. Geach Parke* B. laid down a different rule. The report of that case is somewhat loose and unsatisfactory; but if it were necessary to determine the question, I think the course pursued by BRAMWELL B. in this case far more convenient and correct, and more consistent with principle than that said to have been pursued in *Regina v. Geach*; but I do not understand the learned Baron (now Lord *Wensleydale*) as laying down any inflexible rule of law but merely as pointing out what seemed to him an expedient course in the particular case. I know of no inflexible rule except that the panel must be gone through before the Crown is put to show cause of challenge.

Then it is said that the Judge was wrong in ordering that the jurymen should stand by, and that

that is a term unknown to our law. It is not unknown. It is used in the Irish statute 9 *Geo.* 4. c. 54. s. 9., and amounts to no more than this: that the Crown having challenged a jurymen, he is directed to stand by, instead of taking his seat in the jury box, till the time of stating the cause of challenge has arrived; and that course is perfectly unexceptionable.

1857.

 MANSELL'S
Case.

We then come to the objection that the jurors were not called in their order on the panel. They were called in their order, except in reference to the twelve men whose absence was known; but it is contended, that all the persons on the panel ought to have been called again; but that would have been an idle and useless ceremony, except for the purpose of supporting the first objection; and besides, there is no fixed rule of practice, of which an infringement can form a ground of error, defining whether a jury should be called in their order on the panel or alphabetically, or otherwise. In *Frost's Case* a variation from the usual practice was allowed. The Crown is entitled to have the whole number of jurymen liable to serve gone through before being required to show cause.

Then as to setting aside *Jabez Philpott*. It is to be borne in mind that, up to the time when the jurors are sworn, the accused may take objection to them; up to that time either party may challenge. What the Judge did with respect to *Jabez Philpott* was not of his own mere motion. I do not assert that if a Judge knows of a disqualification he has not the power to act upon that knowledge and set the juror aside, even if no objection be made by either side; but here at all events the Judge acquiesced properly in the application of the counsel for the Crown.

Then it is said that it does not appear that the jury were good and lawful men of the county. First, if

1857.
 MANSELL'S
 Case.

they were not good and lawful men that was a cause of challenge. Secondly, after verdict we must assume that the sheriff discharged his duty by returning proper persons on the panel (a).

WILLES J.—I concur. It is not necessary to decide whether the matters stated as error ought to have appeared on the record, or whether they form a ground of error. In *Gray v. The Queen* it was the opinion of one of the Judges of the Court of Queen's Bench in *Ireland*, that a Court of error ought to entertain every matter on the record as to the construction of the jury, though it was not formally alleged. I own the inclination of my opinion is to the contrary; but, assuming it to be matter for writ of error I am of opinion that the judgment below ought to be affirmed.

The principal question is, whether the time had arrived when the Crown ought to be compelled to assign cause of challenge. This depends upon the construction of the statute 33 *Edw.* 1, which, though repealed, is re-enacted by section 29 of 6 *Geo.* 4. c. 50. In *Staunford's Pleas of the Crown* it is said that the Crown need not show cause until the panel has been perused; and to ascertain when it is said to be perused we must look to the decisions. The meaning of the word "perused" is not merely that the panel has been read through, but it may mean that it has been carefully examined to ascertain whether there are sufficient jurors to constitute a jury. It is said in 4 *Blackstone's Commentaries*, bk. 4, c. 27, p. 353, referring to *Hawkins* and *Hale*, "the King need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury." Here there were challenges, and the panel was gone through with

(a) WILLIAMS J. concurred, but had left the Court before the judgments were delivered.

reference to the jurors in Court. Then *William Ironmonger*, who had previously been ordered to stand by, was again called, and it was again demanded that he should be ordered to stand by. While the matter of this challenge was under discussion twelve jurors, who formed a jury in another case, came into Court. Those jurors had not been called before, and could not have been previously called to any purpose. The application by the Crown that *Ironmonger* should stand by the second time was a continuance of a previous objection, a demand for further time to show cause rather than a fresh challenge; and in my opinion the panel had not then been gone through so as to make it incumbent on the Crown to show cause of challenge. Then it is objected that directing a juror to stand by is error, and that the term "challenge" ought to have been used. The expression "stand by" is not used as a word of art. It signifies that the juror is set on one side till the time for perfecting the challenge has arrived; nor is there any authority for saying that the term challenge is necessary to be used. Whether a Judge might set aside a juryman without waiting for a challenge is a serious question; but I protest against being understood to say that a Judge has not that power in certain cases. If conscientious scruples entertained by a juryman would not prevent his giving in an honest verdict, they would be no ground for objecting to him; but if it was proved on a challenge that they were such as to affect his verdict he ought to be set aside; and I am inclined to think he might, for this cause, be set aside by the Judge without challenge; but on this point I express no final opinion. I do not draw the same inference from *Fitzharris's Case* which the Chief Justice does as to the prisoner having the same right as the Crown of deferring showing cause of challenge. I have nothing to add to what has been said as to the

1857.

 MANSELL'S
Case.

1857.

MANSELL'S
Case.

objection that the jurors were not called in their order on the panel. I think the order of calling the jurors must be left to the discretion of the Court; but I protest against the departure in particular cases from the general rule of practice, as great inconveniences might arise from such a departure. I do not think any such inconvenience could be complained of here, for when the twelve jurors came into Court it was proper to call them as they were called. I thought at first that it should have appeared on the record that the trial was by good and lawful men of the county of *Kent*; but on consideration it seems to me that the first answer is, that after verdict it must be assumed that the jurors were good and lawful men; and the second is that by sect. 27 of the Jury Act, 6 *Geo.* 4. c. 50., the prisoner may challenge them if they are not, and cannot therefore now maintain this objection (a).

BRAMWELL B.—According to my judgment, the application for a juryman to stand by is a question for the discretion of the Judge; and I do not think it is a thing which ought to appear on the record, or be made ground for a writ of error. What was done in this case was, I think, correct. On the question whether what was done was right, I am rather inclined to agree with Mr. *Russell* that the statute of *Edward* I. meant that the Crown should not challenge except for cause; but a practice has grown up for the Crown to set a juryman aside without showing cause until the panel has been gone through; and I think a violation of this practice is not ground of error, but for an application to the discretion of the Court. The statute having passed so many years ago, that delay in showing cause, which was only

(a) His Lordship referred to *Rex v. Sutton*, 8 B. & C. 417.

1857.

MANSELL'S
Case.

discretionary at first, has become a right; and I think that a Judge would do wrong who did not admit it as a matter of right. I think that though the panel has been once gone through the Judge has the power still to continue to postpone the time when he will compel the Crown to assign cause for its challenges, as I think that the application that a jurymen shall stand by is an application to the discretion of the Judge at the trial; but I think the Judge ought not so to continue to postpone the obligation on the Crown to shew cause without good reason for doing so. What was done in this case was, I think, quite correct. It is admitted that the Crown need not show cause until the panel is gone through; and the only sensible limit is, that the Crown need not show cause until it appears that the inquest will otherwise go off for default of jurors. It has been contended that when the panel is once gone through, that is the *punctum temporis* at which the Crown must show cause; but there is no authority for that contention, and I think that even if the twelve jurors had not come into Court the Crown need not have been compelled to assign cause of challenge. But the twelve jurors being in Court, it seems to me irrational to say that they might not be called upon to serve before the Crown was called upon to show cause of challenge; for the rule must at least mean that until each jurymen who can answer has answered, and there are not twelve jurors to go into the box, the Crown cannot be compelled to show cause. With regard to *Geach's case* I agree with the Lord Chief Justice that *Parke B.* did not intend to lay down any positive and inflexible rule of law, but merely pointed out what seemed to him to be an expedient course in that particular case. With regard to the objection to the use of the expression, that a jurymen

1857.
MANSELL'S
Case.

shall "stand by," the answer is, that it is not a term of art, and merely means that the Crown shall have time to show cause of challenge.

WATSON B.—I think the judgment ought to be affirmed. I entertain great doubt whether error lies; but, assuming that it does, the main question is whether, when *Ironmonger* was called a second time, the panel was perused or gone through, and I am of opinion that it was not. It is said that the challenge had begun before the twelve jurors came in; but I think that that was not so, and that no challenge had then taken place. A challenge is a formal matter. The grounds of it must be stated, and it must be communicated in such a way that it can be put on the record, so that the prisoner may demur or counterplead, and error may then be assigned thereon. I think the panel cannot be said to be exhausted where jurymen appear before the actual challenges have commenced, and upon that question *Cook's case* is in point. The Legislature has adopted the term "stand by" in section 9 of the *Irish* statute 9 *Geo.* 4. c. 54. It means that the Crown shall have time to show cause of challenge. With regard to the objection that the jurors are not shown to be good and lawful men, the precedents show that the absence of such an allegation is immaterial; and if they were not so, they might have been challenged by the prisoner. As to the jurors having been called out of their order on the panel, it is no doubt right and proper to call the panel over in the order in which it is usually called, but if that order be not adhered to, it is not ground of error. I do not think the objection to *Jabez Philpott* was too late, for the time to challenge is when the juror comes to the book to be sworn, and this applies equally to the Crown and the prisoner. I do not wish to be understood as saying that, if a Judge sees that injustice is being worked by allowing a particular

man to serve upon a jury, he may not interpose his authority and set him aside if he is morally incapable of performing his duty, just as he may if he is incapacitated by sickness, or physical or mental infirmity. It is not necessary in this case to give any definite opinion upon this point; but the inclination of my opinion is that a Judge does possess such a power.

1857.

 MANSELL'S
Case.

CHANNELL B.—I concur in the opinion that the judgment of the Court of Queen's Bench should be affirmed. I entertain great doubt whether error lies; and I think that for want of a demurrer to the challenge error does not lie; but, assuming that it does, the main question is, whether the panel was perused when *Ironmonger* was called the second time; and I think that it was not, and that the time to put the Crown to show cause of challenge had not then arrived.

When the twelve jurors came into Court no decision had been come to respecting *Ironmonger*—all was *in fieri*. I do not think any importance is to be attached to the circumstance that *Ironmonger* had been called a second time. Had there been a decision respecting him before the twelve jurors came in, the case might have stood on a different footing. I think that nothing had occurred, when *Ironmonger* was called the second time, to prevent the Court from ordering him to stand by. I offer no opinion as to the course which ought to have been adopted in calling over the list the second time had all the names been then called over. As to *Jabez Philpott's* case, the expression that he had been elected and tried to serve as a juror does not, in my opinion, show that the time for challenging him had gone by. I concur as to the Judge having power to remove from the box a juror who is unfit to act; but I say this as matter of opinion, and not as matter of decision.

Judgment affirmed.

1858.

REGINA v. WILLAM ANSELL GODFREY.

In an indictment for false pretences, it was alleged that the prisoner obtained "from A. a cheque for the sum of 8*l.* 14*s.* 6*d.* of the monies of B." Held, that this was a sufficient allegation that the cheque was the property of B.

THE following case was reserved by the Chairman of the Quarter Sessions for the county of *Bedford*.

At the General Quarter Sessions of the Peace for the county of *Bedford* held at *Bedford* on the first day of *July* 1857 the prisoner *William Ansell Godfrey* was tried upon the following indictment.

Bedfordshire } The jurors for our lady the Queen
to wit. } upon their oath present that *William Ansell Godfrey* on the 11th day of *April* in the year of our Lord 1857 unlawfully knowingly and designedly did falsely pretend to one *Cornelius Cox* the said *Cornelius Cox* then being the counting-house clerk of one *William Willis* that the sum of fourteen pounds six shillings and three pence was due to one *Elizabeth Botterill* from the said *William Willis* by means of which false pretence the said *William Ansell Godfrey* did then unlawfully obtain from the said *Cornelius Cox* a cheque for the sum of fourteen pounds six shillings and three pence of the moneys of the said *William Willis* with intent to defraud whereas in truth the said sum of fourteen pounds six shillings and three pence was not due from the said *William Willis* to the said *Elizabeth Botterill* for work done by her for him the said *William Willis*, against the form of the statute in such case made and provided. 2nd count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Ansell Godfrey* afterwards to wit on the 11th day of *April* in the year of our Lord 1857 unlawfully knowingly and

designedly did falsely pretend to one *George Greenhill* then being the servant of the said *William Willis* that the sum of fourteen pounds six shillings and three pence was due to the said *Elizabeth Botterill* from the said *William Willis* for work done by the said *Elizabeth Botterill* for the said *William Willis* by means of which false pretence the said *William Ansell Godfrey* did then unlawfully obtain from the said *George Greenhill* a cheque for the said sum of fourteen pounds six shillings and three pence of the moneys of the said *William Willis* with intent to defraud whereas the said sum of fourteen pounds six shillings and three pence was not due from the said *William Willis* to the said *Elizabeth Botterill* for work done by her for him the said *William Willis*, against the form of the statute in such case made and provided. 3rd count. And the jurors aforesaid upon their oath aforesaid do further present that afterwards to wit on the 18th day of *April* in the year of our Lord 1857 the said *William Ansell Godfrey* unlawfully knowingly and designedly did falsely pretend to the said *Cornelius Cox* then being the counting-house clerk of the said *William Willis* that the sum of eight pounds fourteen shillings and six pence was due to the said *Elizabeth Botterill* from the said *William Willis* for work done by the said *Elizabeth Botterill* for the said *William Willis* by means of which false pretence the said *William Ansell Godfrey* did then unlawfully obtain from the said *Cornelius Cox* a cheque for the sum of eight pounds fourteen shillings and six pence of the moneys of the said *William Willis* with intent to defraud whereas the said sum of eight pounds fourteen shillings and six pence was not due to the said *Elizabeth Botterill* from the said *William Willis* for work done by her for him the said

1858.

GODFREY'S
Case.

1858.
GODFREY'S
Case.

William Willis, against the form of the statute in such case made and provided. 4th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *William Ansell Godfrey* afterwards to wit on the 18th day of *April* in the year of our Lord 1857 unlawfully knowingly and designedly did falsely pretend to the said *George Greenhill* then being the servant of the said *William Willis* that the sum of eight pounds fourteen shillings and six pence was due to the said *Elizabeth Botterill* from the said *William Willis* for work done by the said *Elizabeth Botterill* for the said *William Willis* by means of which false pretence the said *William Ansell Godfrey* did then unlawfully obtain from the said *George Greenhill* a cheque for the sum of eight pounds fourteen shillings and six pence of the moneys of the said *William Willis* with intent to defraud whereas the said sum of eight pounds fourteen shillings and six pence was not due to the said *Elizabeth Botterill* from the said *William Willis* for work done by her for him the said *William Willis*, against the form of the statute in such case made and provided.

The prisoner was found guilty upon the third count of the above indictment, but the counsel for the prisoner moved in arrest of judgment upon the ground that the allegation “the said *William Ansell Godfrey* did then unlawfully obtain from the said *Cornelius Cox* a cheque for the sum of eight pounds fourteen shillings and six pence of the moneys of the said *William Willis*,” did not sufficiently describe the said cheque to be the property of the said *William Willis*.

The Court held the indictment good, but reserved the point for the Court of Criminal Appeal.

The question for the Court of Criminal Appeal is,

whether the third count of the indictment sufficiently shows the ownership of the cheque alleged in such count.

1858.

 GODFREY'S
 Case.

Judgment was postponed, and the prisoner was admitted to bail to appear at the next *January Sessions* to receive judgment or some final order of the Court.

This case was argued on 23rd *January*, 1858, before Lord CAMPBELL C. J., COLERIDGE J., MARTIN B., CROWDER J. and WATSON B.

Tozer appeared for the Crown, and *Metcalf* for the prisoner.

Metcalf, for the prisoner. The indictment does not state to whom the cheque belonged. A cheque is not money, it is a chose in action; and the words "of the moneys of the said *William Willis*" refer to the proceeds of the cheque and not to the cheque itself.

Lord CAMPBELL C. J.—May not a cheque be considered money; and is not this an averment that the cheque *valeat quantum* is of the moneys of the prosecutor? If it had said it was the cheque of *William Willis* it would have done; it is in fact so said.

Metcalf. The cheque is neither money nor is it a chattel of which larceny could be committed at common law; it is classed amongst valuable securities by the 7 & 8 *Geo. 4. c. 29*.

COLERIDGE J.—Why is it not a chattel? Is it not a piece of paper?

Metcalf. In *Regina v. Watts (a)* a conviction upon an indictment for stealing a piece of paper was quashed upon evidence that the thing stolen was

1858.
 GODFREY'S
 Case.

an unstamped agreement, and therefore a chose in action, and not the subject of larceny (a).

MARTIN B.—I should have thought that the cheque was, for this purpose, money ; but, if not, you may strike out the words “of the moneys,” and then the allegation is that the cheque was the cheque of *William Willis*.

Metcalfe. This Court has no power to strike out the words, and, if it had, the property in the cheque would not be sufficiently alleged.

Tozer, for the Crown, referred to *Regina v. Radley* (b), where money was described as of the goods and chattels “of B.”; and the indictment was held good, on the ground that, though “goods and chattels” is not the legal description of money, those words might be rejected as surplusage, and the words “of B.” sufficiently described the money as being the property of B.

LORD CAMPBELL C. J.—No amendment is necessary. The indictment may be read as if the words “of the moneys” were not there. The conviction must be affirmed.

Conviction affirmed.

(a) *Parke* B. dissented on the ground that, being unstamped, it was not evidence of a chose in action. See also *Regina v. Perry*,

1 Den. C. C. 69; *Regina v. Watts*,

2 Den. C. C. 14.

(b) 1 Den. C. C. 450.



REGINA v. THOMAS WRIGHT.

1858.

THE following case was reserved by CROMPTON J. The prisoner was employed by a banking company to conduct a branch bank, and the whole of the duties of that branch bank were discharged by him alone. His salary not only included payment for his services, but also for providing an office in

at the Winter Assize for the county of *Lincoln*, in *December* 1857.

The prisoner was indicted for embezzling money the property of the public officer of *The Stamford, Spalding, and Boston Banking Company*. He was employed by the bank to conduct an office at *Wainfleet*, in connection with the *Boston* branch of the said bank, and the whole of the duties were discharged by him alone. He was paid a salary of 150*l.* a year, for which he was bound to provide a place for carrying on the business ; and the office so provided was in his

his own house (where he carried on another business) for the purposes of the bank. In this office was an iron safe, provided by the bank, into which it was the duty of the prisoner to put at night money which had been received by him during the day, and which had not been required for the purposes of the bank. The manager of the bank kept one key of this box and the prisoner another. The prisoner furnished weekly accounts of monies received and paid by him, shewing the balance in his hands and of what notes, cash or securities that balance consisted. In *September* 1855 the prisoner's accounts were audited and his cash found correct ; but, although for two years afterwards he furnished the usual weekly accounts, no examination was during that time made of the balances appearing from those accounts to be in his hands. In *September* 1857, the manager having appointed a time for examining the cash in the hands of the prisoner, he said he was about 3000*l.* short in his cash, and handed over to the manager 755*l.* 10*s.* which he said was all the cash he had left, and which sum he took from a drawer in the counter and not from the safe. He afterwards, when before the magistrate on a charge of embezzling the 3000*l.*, said, "I admit that I have taken the amount of money which appears in my weekly return dated *September* 12, 1857, and entered as a deficiency of 3021*l.* 9*s.* 9*d.*" The Judge advised the jury to convict the prisoner of larceny, if they were satisfied that any part of the said sum of 3021*l.* 9*s.* 9*d.* had at any time during the two years been taken by the prisoner from money which, having been received from customers, had before such taking been placed in the said safe, and included in the said weekly accounts. The jury found the prisoner guilty of larceny as a clerk, in having stolen some money received from customers which before such stealing had been placed in the safe, and made the subject of a weekly account.

Held: 1, That, there was evidence that the prisoner, as his duty was, placed in the safe money which had been previously received from customers ; that he thereby determined his own exclusive possession of the money ; and that by afterwards taking some of such money out of the safe, *animo furandi*, he was guilty of larceny. 2. That the finding that the prisoner stole "some money" was sufficiently certain, it not being necessary that they should find that any specific amount was stolen on any particular day.

1858.

WRIGHT'S
Case.

own house, in which same house he carried on the business of a wine and spirit merchant.

The office was fitted up at the expense of the bank, and there was in it an iron box or safe provided by, and the property of, the bank, into which it was the prisoner's duty to put any money received during the day and which had not been required for the purposes of the bank. There were duplicate keys of this safe, one of which was kept in the safe at *Boston*, under the control of the manager there. It was the duty of the prisoner to receive money from customers, to be put to their account with the *Boston* branch, and to pay cheques drawn upon the *Boston* branch of the bank. He furnished to the manager of the *Boston* branch, every *Monday*, a return of his transactions during the week, showing the money received from customers and the money paid out, and containing a statement of the balance remaining in his hands, and of the particulars of which it consisted, specifying the notes, cash, or securities, and it was his duty to pay over weekly to the *Boston* manager any excess he did not want for the banking purposes of the office at *Wainfleet*. Besides the money received from customers, he received money from the *Boston* branch from time to time, when he required it, for the purpose of carrying on the business at *Wainfleet*, and the sums so received were entered in the above mentioned weekly accounts. Audits of his accounts were made from time to time, and the amount of cash he had in hand examined. An audit meeting was held on the 29th of *September*, 1855, when his accounts were inspected and found correct, and his cash counted and found to be right. From that time up to and inclusive of *Monday*, the 7th of *September*, 1857, when he made his usual weekly statement, the accounts were furnished at the proper times and were correct in their statement of

receipts and payments, but no audit or examination took place of the balances appearing from the weekly accounts to remain in the prisoner's hands.

1858.

 WRIGHT'S
Case.

On the 12th of *September*, 1857, the public officer of the bank, and the manager of the *Boston* branch, called on the prisoner and made an appointment to examine the cash in hand, when the prisoner said he was very sorry he was about 3000*l.* short in his cash ; that he had not the moral courage to speak out before, but it was so. He handed over all the cash he said was left, amounting to 755*l.* 10*s.* He took this from a drawer in the counter in the office, not from the safe. The drawer was a convenient place for the deposit of the money for banking purposes during the day. The prisoner then, in the presence of the manager of the *Boston* branch, made up the account to that date, showing a deficiency of 3021*l.* 9*s.* 9*d.* When before the magistrate the prisoner made the following statement: " I admit that I have taken the amount of money which appears in my weekly return dated *September* 12th, 1857, and entered as a deficiency of 3021*l.* 9*s.* 9*d.*"

The counsel for the prosecution contended that these facts were evidence to go to the jury of a larceny. That the money sent from the *Boston* branch having been in the possession of the bank, and having been sent to the prisoner as clerk, was still in the possession of the bank, so as to make the taking of it by the prisoner amount to a larceny. Also that the money received at *Wainfleet* from customers, or the balance of it, after the payments of the day, would, if the prisoner performed his duty (as it might in the absence of contradictory evidence be presumed he did), be put into the safe of the bank at night ; and that when put there it was received into possession of the bank, and no longer *in transitu*

1858.

WRIGHT'S
Case.

in the hands of the prisoner as the servant receiving it; and that the bank, keeping a duplicate key to the safe, and the box having been bought by them and office fitted up by them, though the house was the prisoner's the box was the box of the bank, and the money deposited therein was money reduced into the possession of the bank, as in the case of a till of a shopkeeper. And, further, that the weekly statements made by the prisoner to the manager of the *Boston* branch, and received by him, of the balance remaining in the prisoner's hands of sums received during the week from customers, amounted to a statement by the prisoner that he held that balance for the bank, and as the money of the bank, and to an acquiescence by the said manager in his keeping it as their clerk or servant, and that thenceforth his possession of that balance, or any part of it, was a possession by the bank, so as to make it the subject of larceny if afterwards taken by the prisoner.

The prisoner's counsel contended that the prisoner was not a clerk or servant; that there was under the circumstances no such possession by the prisoner as could be treated as a possession by the bank. That there was no evidence that any part of the sum misappropriated had ever been in possession of the bank, for it might all have been money received from customers, and intercepted and misappropriated before it was placed in the safe, and that all the money found on the 12th of *September* actually was in the drawer of the counter, and not in the safe; and further, the money, when paid into the safe, was in the possession of the prisoner, and not in that of the bank; that the house and all in it were the prisoner's for all purposes of possession, and he might have used the safe to hold his own monies coming to him as wine merchant, or otherwise, mixed with the money coming from the

bank customers ; further, that to establish the larceny it was necessary to prove a specific taking of some specific amount, at a particular time, and that there was no evidence of any such taking.

1858.

 WRIGHT'S
Case.

I advised the jury to find the prisoner guilty of larceny, if they were satisfied, on the whole of the facts, that any part of the sum admitted to have been misappropriated had at any time during the two years been taken from the money sent by the *Boston* branch to the prisoner, or from money which, having been received from customers, had, before such taking, been placed in the safe and included in the weekly accounts furnished by the prisoner.

The jury found the prisoner guilty of larceny as a clerk, in having stolen some money received from customers, which, before such stealing, had been placed in the safe and made the subject of a weekly account.

They said that they did not find that the prisoner stole any of the money which had been sent to him from the branch bank of *Boston*.

The question for the opinion of the Court is, Whether the facts furnished sufficient evidence of a larceny, and whether the conviction was correct.

The prisoner was sentenced to six years' penal servitude, and is now in confinement under that sentence.

CHARLES CROMPTON.

This case was argued, on 23rd *January* 1858, before LORD CAMPBELL C. J., COLERIDGE J., MARTIN B., CROMPTON J., CROWDER J. and WATSON B.

Boden appeared for the Crown, and *O'Brien* for the prisoner.

O'Brien, for the prisoner. I contend, first, that there was no evidence to warrant the finding of the

1858.
 WRIGHT'S
 Case.

jury. Secondly, that supposing there was evidence, that the facts found do not show that the prisoner had determined the lawful possession which he originally had of the money, and, consequently, do not amount to larceny in point of law. Thirdly, that the finding of the jury is bad for uncertainty.

Firstly, there was no evidence for the jury as to the specific facts upon which the verdict rests. The evidence was of an admission by the prisoner of the misappropriation of 3000*l*. There must be some facts on which to found the verdict of the jury. Here there was no evidence that any part of the money misappropriated was ever in the strong box.

LORD CAMPBELL C. J.—It was the duty of the prisoner to put it into the strong box, and the presumption is that he did his duty.

O'Brien. There can be no such presumption. There is nothing from which you can infer that the prisoner put any of the money into the strong box and took it out again. If the evidence discloses any offence it is that of embezzlement, and the jury are not to assume that which is not proved for the purpose of finding the prisoner guilty of larceny.

COLERIDGE J.—The prisoner said, “I admit that I have taken the amount.” The question is, whether there was *any* evidence.

O'Brien. That was merely an admission of a misappropriation. It was not an admission of a taking from the box.

COLERIDGE J.—Was not the prisoner then in custody on a charge of larceny?

O'Brien. No, he was then charged with embezzlement, and, being under that charge, “I have taken” must be taken as an admission that he had misappropriated, and that would be entirely consistent with the facts in evidence, as the whole deficiency

1858.

 WRIGHT'S
Case.

might have arisen from the misappropriation of the monies received from customers before reaching the strong box. How can a mere belief, a surmise without evidence, justify a verdict of guilty of larceny? The evidence being that the prisoner had so much money in hand, the presumption was, the continuance of that state of things till the contrary be proved. *Grove's case (a)*, similar in many of its facts to the present, shows that the admission of monies received, and a general deficiency, furnishes evidence of embezzlement only. Why? Because there was no evidence of the additional fact which would be required to be proved before embezzlement could be changed into larceny, namely, that the prisoner had reduced the monies into the possession of the master. A jury are not at liberty to surmise or conjecture that fact; there must be some evidence of it; and the proof of conduct on the part of the prisoner or of his admissions equally consistent with the supposition of embezzlement or of larceny, is evidence of neither. It is only the generality of the finding that gives even the semblance of evidence. Suppose the verdict found that the prisoner on the 1st of *July* had received 50*l.* or 5*l.*, that he had placed that sum in the safe, and afterwards took it out and misappropriated it—and the finding does in fact amount to that—what evidence was there to justify such a finding in the fact that there was a deficiency of over 3000*l.* in the prisoner's accounts? Besides, the finding of the jury amounts to this—that the prisoner had placed all the monies he had received in the safe, and there was no fact before them to justify such a conclusion.

Secondly. The prisoner had not determined his own original rightful possession of the money; for,

(a) 1 Moo. C. C. 447.

1858. even if there is evidence from which the jury might

WRIGHT'S infer that some part of the money had been put into
Case. the strong box, and taken out of that box by the
prisoner, neither the putting the money in the strong
box nor the including it in the weekly accounts
divested the prisoner of the possession which he had
previously lawfully obtained, and thereby reduced the
money into the possession of the bank, so that the
prisoner would commit a trespass in afterwards taking
it wrongfully for his own use. In considering the
decided cases, and applying the principle on which
they proceed, we must always regard the nature and
extent of the authority of the servant. In this case
the prisoner, as manager of the bank, had the posses-
sion and disposition of the money; he was in the
exclusive possession of the premises where the business
was carried on, and he equally had such possession
and disposition whether the money was in the box,
in the drawer, or in his own pocket.

CROMPTON J.—Is it not the same as if a shopman
or clerk receives money for his master and puts it in
the till?

O'Brien. No. The shopman or clerk would not
have to account generally for the amount, but for
the particular money; his simple duty is to put the
money into the till, and it is then in the master's
possession. Here the prisoner always had the posses-
sion of the money, and was not bound to account for
the particular money which he received after it had
reached the safe any more than before it was placed
there. There is the case of *Regina v. Goodenough* (a),
in which the prisoner, who was a clerk to the prose-
cutor, was indicted for embezzlement. It appeared
that the prisoner had received at different times

(a) Dears. C. C. 210.

several sums of money from the prosecutor, a dealer in skins, for the purpose of purchasing skins, and that the prisoner obtained the skins on credit and applied the money to his own use, but debited the prosecutor with money as having been paid for the skins. Under these circumstances the jury found the prisoner guilty of larceny; but it was held by this Court that the conviction was wrong, and although no reasons were given for the decision, it no doubt proceeded upon the ground that the prisoner was accountable to his master for the money, and the offence, therefore, was not larceny.

1858.

 WRIGHT'S
Case.

The case of *Regina v. Gorbutt* (a) adds considerable strength to my argument. There the prisoner was charged with stealing, as a servant, 300*l.*, the property of his masters. There was an accounting, and the money in the prisoner's hands was actually exhibited and produced on the 31st of *May*, and on the 2nd of *June* the prosecutor found 20*l.* deficient. Therefore, if the accounting and the production of the money divested the prisoner of the possession of the money, it was clearly a case of larceny; but it was held that the evidence was not evidence of larceny but of embezzlement; and the point on which the case was so decided no doubt was that the prisoner was still accountable to his master. So the prisoner in this case was still accountable; for the money when in the box was the same as in his own pocket, and the representation made by the prisoner in the weekly accounts merely means "I have so much money of yours in my hands." The principle on which all the cases proceed is, that the appropriation is embezzlement if the servant is still accountable to the master, not for the particular money received but for the amount in his hands.

(a) *Antè*, p. 166.

1858. Thirdly, the finding is not sufficiently specific.

WRIGHT'S
Case.

It is not enough to say that at some time the prisoner stole some money. How is he to defend himself by a plea of *autres fois convict* on so general and uncertain a finding? It may be a finding that he stole 3000*l.*, or that he stole a single farthing. Previously to the 14 & 15 *Vict.* c. 100. s. 18. such a finding would no doubt have been insufficient according to the decisions in *Rex v. Fry (a)*, *Rex v. Grove (b)*, and *Regina v. Bond (c)*; and that statute only dispenses with the necessity for alleging and proving the denomination of the coins taken, and does not make it less necessary than before to show the amount taken.

LORD CAMPBELL C. J.—At least he stole one farthing.

O'Brien. That is not found by the jury; all they say is, that he stole some money; but they do not condescend upon any one particular occasion or upon any specific amount.

COLERIDGE J.—Suppose a man is charged with stealing twenty sheep, and the jury say they do not know whether the man stole nineteen or twenty?

O'Brien. They must at all events say that one sheep was stolen; but here the jury do not say whether the prisoner stole five pounds or one farthing.

Boden, for the Crown, was not called upon by the Court.

LORD CAMPBELL C. J.—We are all of opinion that the conviction is right. The first question is whether there was any evidence to show that the prisoner took from the safe any money which, having been received from the customers of the bank, had been placed by

(a) Russ. & Ry. 432.

(b) 1 Moo. C. C. 447.

(c) 1 Den. C. C. 517.

him in that safe. There was such evidence. It was the duty of the prisoner, when night came, to place the money in the safe, there to remain in a state of security until it should be again taken out to be applied to the purposes of the bank; and he must be assumed to have done that which it was his duty to do. When the money was placed in that safe, which was furnished by the employer, and of which the employer had a duplicate key, the exclusive possession of the prisoner was determined. The money being so deposited in the safe and afterwards taken out of the safe by the prisoner *animo furandi*, he was guilty of larceny. The safe in this case very much resembles a till in a shop. The shopman has access to the till, and has a right to take money out of it for lawful purposes, but if he takes it out *animo furandi* he is a thief. The cases are not distinguishable; and I think this conviction must be affirmed.

1858.

 WRIGHT'S
Case.

COLERIDGE J.—I am of the same opinion. I think that, looking to the large amount of the deficiency and the other circumstances of the case, there was clearly evidence that the prisoner deposited money in the safe, and afterwards took it out and appropriated it. When he put the money in the safe he determined his own exclusive possession, and when he took it out *animo furandi* he committed a larceny.

MARTIN B.—I cannot distinguish this case from that of a shopman taking money out of his master's till, which was put to Mr. *O'Brien* during the argument, and which he admitted to be larceny. The box with the money in it is locked up at night and opened in the morning, and if the manager of the bank had come in the night with the key which he possessed, he could have got at the money. I cannot but regret that the law is in such a state as to permit such questions to be raised, dependent, as

1858. they are, upon the nice distinctions between embezzlement and larceny.

WRIGHT'S
Case.

CROWDER J.—I am of the same opinion. The fact that the prisoner had the entire control over the premises makes no difference. If he took the money from the safe for the purposes of the bank, he did so as part of his duty; but if he took it for his own purposes he was guilty of larceny.

WATSON B.—I am entirely of the same opinion. The safe was the proper place in which to deposit the money, and although the prisoner had access to the safe, that access was only for the purposes of the bank, and if he took money out *animo furandi* he was guilty of larceny. In point of moral turpitude, embezzlement and larceny by a servant are the same, and I think it would be well if the legal distinction were abolished.

Conviction affirmed.

1858.

REGINA v. ADAM JESSOP.

The prisoner fraudulently pretended that a genuine 1*l.* Irish bank note was a 5*l.* note, and thereby obtained the full value of a 5*l.* note in change. Held, that he was properly convicted of obtaining money by

THE following case was reserved by the Chairman of the West Riding of the county of *York*.

The following case was tried before me at the West Riding intermediate Sessions, held at *Wakefield* on the 26th day of *August* last. The prisoner was indicted for obtaining 4*l.* 19*s.* 10½*d.* from *Ann Perkin* by false pretences, in falsely pretending that a certain piece of paper was a 5*l.* note, whereas in truth and in fact it was not a 5*l.* note. The evidence was as follows:—

false pretences, although the person to whom the note was passed could read, and the note upon the face of it afforded ample means of detecting the fraud.

Emma Perkin stated. I live with my mother at the *Globe Inn, Wakefield*. Monday, 10th August, a person came into the house from a quarter past five to six o'clock; he asked for a glass of beer. The prisoner was the man; he was in the tap-room. I served him; the price was three half-pence. He said, "Is the master in." I said, "No; do you want him for anything that I can tell him?" He said, "I only want this 5*l.* note changing." He showed me a 1*l.* note; it was in his hand. I took it and gave it to my mother. The prisoner had on a white felt hat, a blue and white checked smock; he drank his beer and went away. Afterwards my mother sent me to one *Billington's* with the note. He said something to me about the note. I went to the police-office, showed the note to one *Appleyard*, then to *Burton* the inspector, to whom I gave up the note. I, my mother and Mr. *McDonald* went to the railway station, *Wakefield*, twenty minutes to seven o'clock, and saw the prisoner there. He had a blue and black plaid cloak and black cap.

[On cross-examination she stated.] I am sure he said, "I only want this 5*l.* note changing;" the note was put into my hand. I and my mother can read and write. I looked at the note, and thought it was a 5*l.* note.

[On re-examination.] He did not ask for change until he knew the master was not in. This is the note I gave inspector *Burton*; the note was put into my hand open, not crumpled up.

Ann Perkin stated. I keep the *Globe Inn*. My daughter came to me on the 10th of August with a note. I was busy. She wanted change. I gave 4*l.* 19*s.* 10½*d.* to the prisoner for the note. He had on a checked smock and felt hat. I saw him go away. I was suspicious. I sent my daughter with the note

1858.

JESSOP'S
Case.

1858. to *Billington's*. She came back. I went on her return to the police-office; saw *Appleyard*, *Burton* and *McDonald*; we went with *McDonald* to the railway station. Saw the prisoner on the platform coming out of the booking-office. The train was starting for *Doncaster*. He had a ticket at the station; he had a black and blue plaid coat, as described by my daughter.

JESSOP'S
Case.

[On cross-examination.] My daughter put the note in my hand open. I laid it on the table and put it in my purse. I can read *old English*. I gave the prisoner change. He said nothing to me.

[On re-examination.] I did not look particularly at the note. I had no idea of its being a 1*l.* note.

Martha Moorhouse stated. I live with my father, at *Westgate*. On the 10th of *August* I saw the prisoner at our shop at half past five. Our shop is not a hundred yards from *Perkin's* house in the same street, The prisoner said, "Is your father in?" I said, No. "Is your mother in?" No. He said, "Do you sell ham to sell again?" I said, No. "Do you sell tobacco to sell again?" I said, No. "Can you change me a five pound note?" I said, No. He went away.

Charles Smithson stated. I live at *Wakefield*, and keep a tobacconist's shop. The prisoner came on the 10th of *August*, *Monday*, about five in the afternoon. He asked to see some cigars; he made a bargain for a pound box, 9*s.* 6*d.* was the price; he offered a 1*l.* *Irish* note for it in payment. I said, this is a 1*l.* *Irish* note, I have not seen one for ten years. He took his note and left the cigars; he laid the note before me, and asked, "Can you change that?"

John Woodhead stated. I live at *Wakefield*; I have seen the prisoner before in my shop on the 10th of *August*, he had on a checked smock and felt hat; he

asked for a light jacket and cap, as he was going to *Horncastle* fair. He wanted to pay me 7s., and leave his hat and smock until he came from *Horncastle*. He paid me 2s. for the cap and left the coat; he left the felt hat in the shop.

1858.

 JESSOP'S
Case.

Elizabeth Dodson stated. My husband keeps the *Grey Horse, Kirkgate*. The prisoner came on the 10th of *August*; in the morning he went out, came again at three o'clock, and had something to eat; he had on a blue and black plaid coat, he pulled it off and gave it me, put on the checked plaid smock; he had on a white felt hat. In the evening, about six o'clock, he got three pennyworth of gin, asked for his coat and bundle, put on the coat, took away the smock with him, went away, saying he was going to *Doncaster* fair.

[On cross-examination.] I thought he changed his coat on account of the warm weather.

James McDonald stated. I am chief constable, *Wakefield*; Mrs. *Perkin* and her daughter were at the police-office ten minutes past six on *Monday* the 10th of *August*; they made a complaint about the note. I saw the note; went with them to the railway, and waited; the prisoner came, and booked for *Doncaster*; he had on a dark plaid coat, had a cap and a whip like a dealer, was smoking a cigar; I took him to the parcel office, and charged him with passing a 1*l.* *Irish* note to Mrs. *Perkin, Westgate*; he said, "I never had a 1*l.* note, I have not changed one to-day;" I searched him; found 3 sovereigns, 2 half sovereigns, 14*s.* 2*d.* in silver, 7*d.* in copper, and a railway ticket for *Doncaster*; he said he had not had on a white hat and checked smock. I sent for *Perkin* and her daughter; I said, "this is the person to whom you paid the note;" he said, "I have

1858. never seen them before." The parcel which he had
 JESSOP'S contained a checked smock and a shirt.
 Case.

[On cross-examination]. I told him I was a constable.

William Burton stated. I am a police constable. I produce this note; I received it from Mrs. *Perkin* on the 10th of *August*, and have had it ever since; on the face of the note is "*one*;" one is at each corner of the note; it is a Bank of *Ireland* note; *one pound* is clearly printed in the middle.

Mr. *Foster*, for the prisoner, objected that there was no case to go to a jury, relying on these grounds:

1st. The prosecutrix had means of detecting, from the face of the note itself, that it was not a 5*l.* note, by using common prudence and caution: the party having at the time the means of detection at hand, need not to have been deceived: *Young's Case* (a).

2nd. The note was of the same species as a 5*l.* note, differing only in quality and value; it comes within *Elkington's case* (b).

The jury found the prisoner guilty, and a sentence of four calendar months hard labour in the House of Correction was passed on him, but he was admitted to bail until the opinion of the Court of Criminal Appeal can be had.

This case was argued, on the 28th *January* 1858, before Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.

No counsel appeared for the prisoner.

J. B. Maule, for the Crown, was stopped by the Court.

Lord CAMPBELL C. J.—We are all of opinion that

(a) 2 East P. C. 828.

(b) *Regina v. Bryan*, *antè*, p. 265.

the conviction was right. In many cases a person giving change would not look at the note, but, being told it was a 5*l.* note and asked for change, would believe the statement of the party offering the note and change it. Then if, giving faith to the false representation, the change is given, the money is obtained by false pretences. There is nothing in the other point raised by the prisoner's counsel.

Conviction affirmed.

1858.

JESSOP'S
Case.

REGINA v. GEORGE MICHAEL JENNINGS.

1858.

THE following case was reserved by the Chairman of the *Bedfordshire* Quarter Sessions.

At the General Quarter Sessions of the Peace for the county of *Bedford*, held at *Bedford* on the 21st day of *October* 1857, *George Michael Jennings* was tried on an indictment which was in the following words.

Bedfordshire } The jurors for our lady the Queen
to wit. } upon their oath present that *George Michael Jennings* on the twenty fifth day of *September* in the year of our lord one thousand eight hundred and fifty seven was servant to *Edward Sanders* and that the said *George Michael Jennings* whilst he was such servant to the said *Edward Sanders* as aforesaid to wit on the day and year aforesaid certain money to wit the sum of three pounds eight shillings of and belonging to the said *Edward Sanders* his master feloniously did steal take and carry away, against the form of the statute in such case made and provided.

An indictment charged that the prisoner whilst servant of *A.* stole the money of *A.* It appeared that the prisoner was not the servant of *A.* but the servant of *B.*, and that the money which he stole was the money of *B.*, but in the possession of *A.* as the agent of *B.* Held, that the allegation in the indictment as to the prisoner being servant might be rejected as surplusage, and the pri-

soner convicted of simple larceny, the money being properly alleged to belong to *A.*, who had a special property therein.

1858.

JENNINGS'S
Case.

And the jurors aforesaid upon their oath aforesaid further present that the said *George Michael Jennings* within six calendar months from the time of committing the offence in the first count of the indictment charged to wit on the twenty ninth day of *September* in the year of our Lord one thousand eight hundred and fifty seven being then servant to the said *Edward Sanders* feloniously did steal take and carry away certain money to wit the sum of one pound ten shillings and two pence of and belonging to the said *Edward Sanders* his master, against the form of the statute in such case made and provided.

The prisoner pleaded not guilty to this indictment.

At the trial it appeared that *Edward Sanders* was the agent of one Mrs. *Sanders*, that the prisoner was her servant at the time he took the monies mentioned in the indictment, and that the monies when taken were in the possession of *Edward Sanders* as agent of Mrs. *Sanders*.

Counsel for the prisoner objected that the variance between the indictment and the evidence was fatal, and that the prisoner could not be convicted either of larceny as a servant or simple larceny. I directed the jury that the averments in the indictment, as to the prisoner being the servant of *Edward Sanders*, might be rejected as surplusage; that *Edward Sanders* had a special property in the money, and that if they believed the witnesses for the prosecution, they might find the prisoner guilty of simple larceny.

The jury found the prisoner guilty of simple larceny.

The opinion of the Court of Criminal Appeal is requested, whether this conviction was right.

Judgment was postponed. The prisoner was remanded to prison, but has since been discharged on recognizance of bail to appear and receive judgment.

This case was considered, on 28th *January* 1858, 1858.
by Lord CAMPBELL C. J., MARTIN B., CROWDER J., JENNINGS's
WILLES J. and WATSON B. Case.

No counsel appeared.

Lord CAMPBELL C. J.—We are all clearly of opinion that the conviction was right. Proof of the allegation in the indictment, that the prisoner was the servant of *Edward Sanders*, would only be necessary for the purpose of convicting the prisoner of the compound offence; but it is quite unnecessary to support the charge of simple larceny, and may be rejected. The other objection raised is, that the money was the money of Mrs. *Sanders*, and was only in the possession of *Edward Sanders* as her agent; but, that being so, he had a special property in it. The conviction, therefore, must be affirmed.

Conviction affirmed.

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REGINA v. MARY ANN FRY.
Sb. 7 Comp Cr Cas 394

1858.

THE following case was reserved by the assistant Chairman of the *Kent* Sessions.

At the General Quarter Sessions of the Peace for the county of *Kent*, holden at *Maidstone* on the 22nd day of *October* 1857, *Mary Ann Fry* was tried upon the following indictment.

alleged being that the prisoner kept a shop and that the prosecutrix might go and live with her at the said shop until she obtained a situation.

It was proved that the prisoner falsely told the prosecutrix that she kept a shop at *N.*, and promised prosecutrix that she should go home with her until she got a situation, and that the prosecutrix lent the prisoner half a sovereign which she promised to repay when they got home; but that the prisoner left the prosecutrix as soon as she had got the money, and did not return. The jury found that the prosecutrix parted with the money under the belief that the prisoner kept a shop at *N.*; and that she (the prosecutrix) should have the money when she went home with her. *Held*, that the indictment was good and was supported by the evidence, and that the conviction was right.

The prisoner was convicted on an indictment charging her with obtaining 10s. by false pretences; one of the false pretences

1858.

FRY'S
Case.

Kent to wit.] The jurors for our lady the Queen upon their oath present that *Mary Ann Fry* on the 26th day of *September* in the year of our Lord 1857 unlawfully and knowingly did falsely pretend to *Sarah Mole* that she the said *Mary Ann Fry* kept a shop and that she the said *Sarah Mole* might go and live with her the said *Mary Ann Fry* at the said shop until she the said *Sarah Mole* had got a situation and that the husband of the said *Mary Ann Fry* had ordered a pair of blankets and had not paid for them and that she the said *Mary Ann Fry* had not money enough to pay for them and that she the said *Mary Ann Fry* had got a bonnet or a cap or some article of value in a bonnet box which she wanted the said *Sarah Mole* to take and keep for her. By means of which said false pretences the said *Mary Ann Fry* did then unlawfully obtain from the said *Sarah Mole* certain money to wit the sum of ten shillings of the moneys of the said *Sarah Mole* with intent to defraud whereas in truth and in fact the said *Mary Ann Fry* did not then keep a shop and the husband of the said *Mary Ann Fry* had not ordered a pair of blankets and she the said *Mary Ann Fry* had not got either a bonnet or a cap or anything in the said bonnet box but stones and pieces of brick and dirt as she the said *Mary Ann Fry* at the time she so falsely pretended as aforesaid well knew, against the form of the statute in such case made and provided and against the peace of our Sovereign lady the Queen her Crown and dignity.

The evidence, so far as it was material to the present case, was as follows.

Sarah Mole.—On the 26th *September* I went to the *Erith* station. When I was taking my ticket the prisoner was standing near me ; I dropt a half sovereign ; she picked it up and gave it to me. The

prisoner got into the same carriage, and we rode together to *Woolwich*. I told her I was looking for a situation. The prisoner said she lived on *Northumberland Heath* and kept a shop. She promised me I should go home with her until I got a situation. She asked me to go to *Dartford*, and I went with her. We went to the *Crown and Anchor* public house and had some refreshment there; whilst there she told me to stop there till she came back. She came back in about twenty minutes and had a new bonnet box and a handkerchief tied over it; she told me to hold it till she came back again. I held it; it appeared heavy, and I thought there was something in it which she had been buying. When she brought the bonnet box she said that her husband had been and got a pair of blankets but he had not money enough to pay for them, and then asked me if I had got 10s. I told her I had: she said, Would you mind lending it to me? I said, You are a stranger to me. She had said, If you lend me this 10s. I'll take you home until you get a situation. I lent her the half sovereign because she said she kept a shop on *Northumberland Heath* and I should have it when I got home with her. She went away. When I found the prisoner did not come back I opened the bonnet box and found some small pieces of stone and brick. On the 28th *September* I saw the prisoner, and she said she never saw me before.

1858.

 FRY'S
Case.

Robert Carr Ebb, a police serjeant.—I went in search of the prisoner; she lives at *North End, Crayford*; she lodges in the house and does not keep a shop on *Northumberland Heath*.

I directed the jury, if they believed the facts stated on the part of the prosecutrix, to find a special verdict. They found the prisoner guilty of fraudulently obtaining the half sovereign, the prosecutrix parting with it

1858.

FRY'S
Case.

under the belief that the prisoner kept a shop on *Northumberland Heath*, and that the prosecutrix should have it when she went home with her. As I entertained some doubts as to the legality of the conviction, I respited the judgment and reserved the case for the opinion of the Court of Criminal Appeal upon the following questions:

First. Whether the indictment sufficiently charges the prisoner with having obtained the money from the prosecutrix by means of the false pretences, there being no averment that the prisoner asked the prosecutrix to lend her the money.

Second. Whether the pretence used was a sufficient false pretence within the statute.

Third. Whether the pretence charged in the indictment is sufficiently proved as laid.

(Signed) *James Espinasse*,
Assistant Chairman.

This case was argued, on 28th *January* 1858, before Lord CAMPBELL C. J., MARTIN B., CROWDER J., WILLES J. and WATSON B.

No counsel appeared for the prisoner. *C. G. Addison*, who appeared for the Crown, was stopped by the Court.

Lord CAMPBELL C. J.—We are all of opinion that the indictment was good, and that it was supported by the evidence. The prisoner falsely pretended that she kept a shop on *Northumberland Heath*, and the prosecutrix was induced by that false pretence to part with her money.

Conviction affirmed.

J. C. Nov & Cas. 408

REGINA v. WILLIAM TREBILCOCK.

1858.

THE following case was reserved by the Recorder of *Plymouth*.

At the General Quarter Sessions of the Peace holden in and for the borough of *Plymouth* on the 1st day of *January* 1858, before *Charles Saunders*, Recorder, the prisoner, *William Trebilcock*, was tried on an indictment which charged him,

First. With a larceny, under the statute 20 & 21 *Vict. c. 54. s. 4. (a)*, in having, as bailee of plate the property of the prosecutrix, fraudulently converted it to his own use.

Secondly. With a common larceny of the same plate.

The jury found the prisoner guilty on both counts of the indictment, but recommended him to mercy, "believing that he intended ultimately to return the property." The question for the opinion of the Court is, whether, consistently with the ground upon which

The prisoner was indicted for larceny under s. 4 of The Fraudulent Trustees Act, 20 & 21 *Vict. c. 54.*, and, in a 2nd count, for larceny at common law. It appeared that the prosecutrix having deposited a box of plate with the prisoner for safe custody, he broke open the box and took the plate out and pawned it. The jury returned a verdict of guilty, but recommended

the prisoner to mercy, on the ground that they believed that he intended ultimately to return the plate to the prosecutrix:—*Held*, that, although, as decided in *Regina v. Holloway (a)*, to constitute larceny there must be an intention permanently to deprive the owner of the property, the recommendation by the jury did not so qualify the verdict as to bring the case within the principle of that decision.

Semble, that if not a larceny of the plate at common law, it was not made so by section 4 of The Fraudulent Trustees Act.

(a) 1 Den. C. C. 370.

(a) The section is as follows:—
"If any person being a bailee of any property shall fraudulently take or convert the same to his own use, or the use of any person other

than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny."

1858.

TREBIL-
COCK'S
Case.

the jury recommended the prisoner to mercy, the conviction was right upon both or either of the counts.

The case was this.

The prosecutrix, Miss *Palmer*, resided at *Plymouth*, and, going to *London* for eight or ten days, deposited with the prisoner, a tradesman at *Plymouth*, who had offered to take care of anything for her during her absence, a chest of valuable plate for safe custody till she returned. The prisoner had been told that the prosecutrix would leave a parcel with him, which he said that he would put in his iron chest to keep for her. When the chest of plate was placed in the prisoner's hands it was locked (the prosecutrix keeping the key), then covered with a wrapper, sewn together, and sealed in a great number of places, and then tied with a cord. The prisoner was not informed of the contents of this parcel, nor was any key given to him. In a day or two after the prosecutrix left for *London*, the prisoner had uncorded the chest, broken the seals, taken off the wrapper, procured a key, opened the chest, and taken out a part of the plate and offered it to one *Woolf*, at *Plymouth*, as a security for the advance of 50*l*. The pawnbroker took up one of the pieces of plate, which bore the crest, and also a superscription with the name, of Sir *George Magrath* upon it, and expressing his dislike to have anything to do with it; the prisoner said that he was under an engagement to be married to Lady *Magrath*. The prosecutrix had lived with Sir *George Magrath*, and when he died the plate, among other property, came into her possession. *Woolf* ultimately declined any advance upon it. The prisoner then communicated by letter with another pawnbroker named *Druiff*, at *Newport* in *Monmouthshire*, with whom the prisoner had before had bill transactions. *Druiff* came to the

1858.

TREBIL-
COCK'S
Case.

prisoner at *Plymouth*, and advanced him 200*l.*, taking bills for the amount and the whole chest of plate, worth from 500*l.* to 600*l.*, as a collateral security for the loan. *Druiff* took the plate away with him to *Newport*. The prisoner, by way of accounting to *Druiff* for the possession of the plate, represented to him that he was going to get married to the lady of the late Sir *George Magrath*, and that she had given him the plate to take care of till they were married. The prosecutrix went to *London* on the 8th day of *November*, and returned on the 17th of the same month. On her return, the prosecutrix tried often to see the prisoner, but could not do so till the 26th, when she first saw him and asked for the parcel; the prisoner said he would send it to her the same evening. It was not sent. The prosecutrix went often backwards and forwards to the prisoner's shops and private residence to see the prisoner, but could not see him again till the 2nd *December*, when, the prosecutrix insisting upon instantly having her parcel, the prisoner said she could not have it, as it was out of town; he had sent it to *Bristol*. Then he said it was now further than *Bristol*; that it was in *Wales*, but that he would write a letter, and she should have it on *Friday*. The parcel did not arrive. The prisoner refused to tell in whose hands it was, but the prosecutrix had learnt from the prisoner's father that *Druiff* had it. The inspector of police went to *Newport*, and found the chest of plate there, but *Druiff* refused to give it up unless upon repayment of the two hundred pounds for which it was deposited with him as security. The prisoner could not redeem it; and upon the facts being made known to the prosecutrix, she had the prisoner taken into custody on a charge of stealing, and the police took possession of the chest of plate as stolen property.

1858.

TREBIL-
COCK'S
Case.

Upon the finding of the jury, with the recommendation to mercy above stated, the counsel for the prisoner contended that, to support either of the counts in the indictment, it was necessary that the prisoner should have intended permanently to deprive the prosecutrix of her property, and that, as the jury believed that his intention was ultimately to return it, the verdict was wrong.

The prisoner was committed to prison, and sentence deferred until the opinion of the Judges shall have been obtained on the question raised.

If the Court shall be of opinion that the ground upon which the jury recommended the prisoner to mercy may consist with the verdict upon both or either of the counts of the indictment, the verdict to stand upon both or either of the counts accordingly.

If the recommendation may not consist with the verdict on either count, then the verdict to be set aside, and a verdict of not guilty to be recorded.

This case was argued, on 1st *February* 1858, before Lord CAMPBELL C. J., COLERIDGE J., MARTIN B., CROWDER J. and WATSON B.

Carter appeared for the Crown, and *E. W. Cox* for the prisoner.

Lord CAMPBELL C. J. (addressing the counsel for the prisoner).—You need not consider the recent statute. If it is not larceny at common law, the statute will not make it so ; but how do you show that it is not a larceny at common law ?

COLERIDGE J.—There was no need of the count upon the statute.

E. W. Cox. I contend that the prisoner was not, upon the finding of the jury, guilty of larceny at common law, inasmuch as he had no intention to deprive the owner permanently of her property. It

is decided, in *Regina v. Holloway* (a), that an essential element of larceny is an intention to deprive the owner wholly and permanently of his property, and the law as laid down in that case is confirmed by *Regina v. Poole and Yeates* (b).

1858.

TREBIL-
COCK'S
Case.

COLERIDGE J.—Your proposition is clear, but how do you bring this case within it?

E. W. Cox. The jury have expressly found that the prisoner intended ultimately to return the plate, and that is quite inconsistent with the admitted requisite to larceny, an intention permanently to deprive the owner of it.

LORD CAMPBELL C. J.—That is not a part of the verdict. The jury found the prisoner guilty without qualification. They then recommended him to mercy, and they say loosely that the reason is that they think he had an ultimate intention to return the plate, that is, if ever he could raise the money, which was improbable.

COLERIDGE J.—The jury do not say that the prisoner intended to return the plate at the time he took it.

E. W. Cox. The larceny, if larceny it was, was complete at the moment when the prisoner deposited the box with the pledgee. That is the crime the jury were trying, not what may have passed in his mind afterwards. They found that at that time, at the moment of committing the larceny, he did not intend to deprive the prosecutrix permanently of the property. Their verdict could have had reference to no other time, and if no larcenous intention existed at that time, or, which is the same thing, if the jury believe that no such intention existed, then the crime of larceny was not complete, and the prisoner was entitled to an acquittal.

(a) 1 Den. C. C. 370.

(b) *Antè*, p. 345.

1858.

TREBIL-
COCK'S
Case.

Carter, for the Crown, was not called upon by the Court.

LORD CAMPBELL C. J.—The general proposition contended for by Mr. *Cox* is perfectly correct. To constitute larceny there must be an intention on the part of the thief to appropriate the property to his own use, and usurp an entire dominion over it; and if, at the time of the asportation, his intention is to make a mere temporary use of the chattels taken, so that the *dominus* shall again have the use of them afterwards, that is a trespass, but not a larceny; but that law does not apply to this case. Here there was abundant evidence of a larceny at common law—abundant evidence from which the jury might find that the prisoner feloniously stole the plate; and in fact the jury have so found and have returned a verdict of guilty. But they have recommended the prisoner to mercy, and accompanied that recommendation with a statement as to the prisoner's intention to return the stolen property. Now I doubt whether what the jury say, in giving their reason for recommending the prisoner to mercy, is to be considered as part of their finding; but, even assuming it to be so, all that they say is that he intended ultimately to return the property—not that at the time of the wrongful taking he had any such intention.

COLERIDGE J.—I am of the same opinion. There is no question about the law in this case; but the question is merely as to the facts, and upon the facts it appears that the prisoner had put it out of his power to return the plate which he had taken. Then, what must we do in order to make sense of the finding of the jury? It is to be observed that the recommendation to mercy in itself assumes that the verdict of guilty is correct; but the jury seem to have thought that the prisoner had it in his mind at some uncertain

time, if he could get hold of it again, to restore the property; and they might consider that a sufficient reason for recommending him to mercy. That interpretation makes sense of their finding; whilst the construction put upon it by Mr. *Cox* renders their conduct quite inconsistent and insensible.

1858.

TREBIL-
COCK'S
Case.

MARTIN B.—I am of the same opinion. The recommendation to mercy, and the words which accompanied it, were no part of the verdict, and had nothing to do with it; and when the jury said “guilty” there was an end of the matter, so far as the verdict was concerned. But I also think that, even if it did form part of the verdict, it would not have the effect of bringing it within the principle contended for. It seems to me quite clear that this prisoner stole the plate and then pledged it for 200*l.*; and I think that in so doing he “usurped the entire dominion over it” within the meaning of that expression as used by PARKE B. in *Regina v. Holloway*. If, therefore, a special verdict had been found, in the very terms used by the jury when they recommended the prisoner to mercy, I should have said that he was still guilty of larceny.

CROWDER J.—It seems to me also that upon the facts of this case no other rational conclusion could be arrived at, except that the prisoner stole the plate. He broke open the box and took out the plate and stole it; but the jury recommended him to mercy because they thought that he had an intention of restoring the property some time if he could. Probably it very often happens that if stolen goods are pawned there is an intention to get them back again, if the person pawning them should ever be able to do so, and in that case to return them; but such an intention affords no ground for setting aside a verdict of guilty

1858.

TREBIL-
COCK'S
Case.

when the offence of larceny is satisfactorily proved by the evidence.

WATSON B.—I also think that this is the clearest case of larceny possible, though the jury have recommended the prisoner to mercy because they thought that he would ultimately have restored the property if he could have got it back.

LORD CAMPBELL C. J.—I wish to add that I think that what a jury may say in recommending a prisoner to mercy is not a matter upon which a case should be reserved for the opinion of this Court.

Conviction affirmed.

1858.

REGINA *v.* THOMAS CLOSS.

A forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not a forgery.

Semble, that if a man in the course of his trade or business,

openly carried on, puts a false mark or token upon a spurious article so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is guilty of a cheat at common law.

THE following case was reserved and stated at the Central Criminal Court.

The prisoner was tried at the *October* Sessions of the Central Criminal Court on an indictment, the first count of which charged him with obtaining money by false pretences, and upon this he was acquitted. He was however found guilty upon the remaining counts of the indictment, which were as follows.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that before the time of the commission of the offence in this count herein-after stated and charged one *John Linnell* of *Redhill*

in the county of *Surrey* an artist in painting of great celebrity and well known as such to the liege subjects of our lady the Queen had painted a certain large and valuable picture whereon he had painted his name to denote that the said picture had been painted by him the said *John Linnell*. And the jurors aforesaid upon their oath aforesaid do further present that the said *Thomas Closs* being a dealer in pictures well knowing the premises aforesaid and being a person of fraudulent mind and disposition and devising and contriving and intending to cheat and defraud on the 24th day of *July* in the year of our Lord 1857 and on divers other days between that day and the time of taking this inquisition knowingly wilfully falsely fraudulently and deceitfully and within the jurisdiction aforesaid did keep in a certain shop wherein he the said *Thomas Closs* did carry on his said trade of a dealer in pictures a certain painted copy of the said picture on which said painted copy was then and there unlawfully painted and forged the name of the said *John Linnell* with intent thereby and by means thereby to denote that the said copy of the said picture was an original picture painted by the said *John Linnell*. And the jurors aforesaid upon their oath aforesaid do further present that the said *Thomas Closs* well knowing the said picture so in his possession to be such copy of the said picture so painted by the said *John Linnell* as aforesaid and well knowing the name of the said *John Linnell* so painted upon the said copy to be forged did wilfully falsely fraudulently and deceitfully and within the jurisdiction aforesaid offer and expose for sale the said copy with the said forged name so upon it and did offer utter dispose of sell and put off to *Henry Fitzpatrick* the said painted copy as and for the genuine picture of the said *John Linnell* with intent to cheat and defraud the said *Henry Fitzpatrick*

1858.

Closs's
Case.

1858. of his monies and valuable securities and that the said
CLOSS's *Thomas Closs* did so fraudulently cheat and defraud
Case. the said *Henry Fitzpatrick* of and did so fraudulently
obtain from the said *Henry Fitzpatrick* valuable securities (to wit) a cheque and three bills of exchange with intent to defraud.

3rd count. And the jurors aforesaid upon their oath aforesaid do further present that before the time of the commission of the offence in this count herein-after stated and charged one *John Linnell* of *Redhill* in the county of *Surrey* an artist in painting of great celebrity and well known as such to the liege subjects of our lady the Queen had painted a certain large and valuable picture whereon he had painted his name to denote that the said picture had been painted by the said *John Linnell*. And the jurors aforesaid upon their oath aforesaid do further present that the said *Thomas Closs* being a dealer in pictures and being a person of fraudulent mind and disposition and devising contriving and intending to cheat and defraud on the 24th day of *July* in the year of our Lord 1857 and within the jurisdiction aforesaid unlawfully wilfully and wickedly did procure and have in his possession for the purposes of sale a certain painted copy of the said picture on which said painted copy of the said picture was then and there unlawfully painted and forged the name of the said *John Linnell*. And the jurors aforesaid upon their oath aforesaid do further present that the said *Thomas Closs* well knowing the name of the said *John Linnell* so painted upon the said copy to be forged did then and there and within the jurisdiction aforesaid unlawfully deceitfully wickedly and fraudulently offer sell dispose of utter and put off to the said *Henry Fitzpatrick* the said painted copy of the said original painted picture with the name of the said *John Linnell* so painted

and forged thereon as aforesaid and the said forged name of the said *John Linnell* for a certain large sum of money to wit the sum of 130*l.*, to the great damage and deception of the said *Henry Fitzpatrick* to the evil example of all others in the like case offending and against the peace of our lady the Queen her Crown and dignity.

1858.

 CLOSS'S
Case.

It was objected by the prisoner's counsel, in arrest of judgment, that these counts disclosed no indictable offence, and the judgment was respited until the next sessions, that the opinion of this Court might be taken whether or not the second and third counts, or either of them, sufficiently showed an offence indictable at common law. The prisoner remains in custody.

This case was argued, on 21st *November* 1857, before COCKBURN C. J., ERLE J., WILLIAMS J., CROMPTON J. and CHANNELL B.

Metcalfe appeared for the Crown, and *McIntyre* for the prisoner.

McIntyre, for the prisoner.

The second and third counts are bad in arrest of judgment. The second count charges in substance a cheat at common law, and that cheat is not properly laid. An indictment for a cheat at common law should so set out the facts as to make it appear on the record that the cheat charged would affect, not a private individual, but the public generally (2 *Russ. on Crimes*, 280). The obtaining money by means of a mere assertion, or by the use of a false private token, is not an indictable offence at common law, (2 *East P. C.* 820). In this count the allegation is, that a false token of a private character was used.

The third count is for forgery of the name of *John Linnell* on a picture. Forgery is defined to be the fraudulent making or alteration of a writing, to the

1858.

CLOSS'S
Case.

prejudice of another's right (2 *Russ. on Crimes*, 318). In the case of a written instrument, the forgery of the signature is really the forgery of the whole instrument, and is always so laid in the indictment. Unless, therefore, an indictment would lie for the forgery of a picture, this count cannot be supported. The averments in this count amount to no more than this, in substance,—that the prisoner falsely pretended that the picture was *Linnell's*. To falsely pretend that a gun was made by *Manton* would be no offence at common law; and no case has gone the length of holding that to stamp the name of *Manton* on a gun would be forgery.

CROMPTON J.—That would be forgery of a trade mark, and not of a name.

COCKBURN C. J.—Stamping a name on a gun would not be a writing; it would be the imitation of a mark, not of a signature.

McIntyre. The name put by a painter in the corner of a picture is not his signature. It is only a mark to show that the picture was painted by him. Any arbitrary sign or figure might be used for the same purpose instead of the name; it is a part of the painting, and every faithful copy would contain it. The averments mean that the whole picture was made to represent the whole of the original; and the averment of the imitation of the signature is no more than an averment of the imitation of a tree or a house in the original. There is no allegation that the picture was passed off as the original, or the signature as the genuine signature; neither is there any averment that the name was painted for the purpose of inducing the belief that the picture was the original.

Metcalfe, for the Crown. It is not necessary to show that the cheat alleged in a count for cheating at common law is one which affects the public gene-

rally. If to a bare lie you add a false token it is indictable, and it is a mistake to suppose that the public must be affected.

1858.

 CLOSS'S
Case.

ERLE J.—The prisoner did not get the money for the name but for the picture.

Metcalf. He obtained it by the whole transaction. In *Worrell's case* (a) deceitfully counterfeiting a general seal or mark of the trade, on cloth of a certain description and quality, was held to be an indictable cheat. This case and *Farmer's case* (b) show that the fraud need not be of a strictly public nature, and that any device calculated to defraud an ordinarily cautious person is indictable. In this case the picture was in fact a device calculated to deceive the public.

The third count for forgery is good. In *Regina v. Sharman* (c) it was decided that it is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law, and that the effecting the fraud is immaterial. This decision overruled the decision in *Regina v. Boulton* (d)

A false certificate in writing is the subject of an indictment at common law; *Regina v. Toshack* (e).

I therefore contend that where, as here, the name of the artist is painted on the picture, it is in the nature of a certificate, and the fact that the signature is on canvas, instead of being on a separate piece of paper, does not render the offence less indictable.

WILLIAMS J.—But it is consistent with all the allegations that the prisoner may have sold the picture without calling attention to the signature.

Metcalf. The forging the name on a picture is in fact a forgery of the picture.

(a) Trem. P. C. 106.

(d) 2 Car. & Kir. 604.

(b) Trem. P. C. 109.

(e) 1 Den. C. C. 492.

(c) Dears. C. C. 235.

1858. COCKBURN C. J.—If you go beyond writing where
 CLOSS'S are you to stop? Can sculpture be the subject of
 Case. forgery?

McIntyre replied.

Cur. adv. vult.

The judgment of the Court was delivered, on 30th November 1857, by

COCKBURN C. J.—The defendant was indicted on a charge, set out in three counts of the indictment, that he had sold to one *Fitzpatrick* a picture as and for an original picture painted by Mr. *Linnell*, when in point of fact it was only a copy of a picture which Mr. *Linnell* had painted; and that he passed it off by means of having the name “*J. Linnell*” painted in the corner of the picture, in imitation of the original one, on which that name was painted by the painter. Upon the first count, for obtaining money by false pretences, the defendant was acquitted; the second was for a cheat at common law; and the third was for a cheat at common law by means of a forgery. As to the third count we are all of opinion that there was no forgery. A forgery must be of some document or writing; and this was merely in the nature of a mark put upon the painting with a view of identifying it, and was no more than if the painter put any other arbitrary mark as a recognition of the picture being his. As to the second count, we have carefully examined the authorities, and the result is that we think if a person, in the course of his trade openly and publicly carried on, were to put a false mark or token upon an article, so as to pass it off as a genuine one when in fact it was only a spurious one, and the article was sold and money obtained by means of that false mark or token, that would be a cheat at common law. As, for instance, in the case

put by way of example during the argument, if a man sold a gun with the mark of a particular manufacturer upon it, so as to make it appear like the genuine production of the manufacturer, that would be a false mark or token, and the party would be guilty of a cheat, and therefore liable to punishment if the indictment were fairly framed so as to meet the case; and therefore, upon the second count of this indictment, the prisoner would have been liable to have been convicted if that count had been properly framed; but we think that count is faulty in this respect, that, although it sets out the false token, it does not sufficiently show that it was by means of such false token the defendant was enabled to pass off the picture and obtain the money. The conviction, therefore, cannot be sustained.

1858.

CLOSS'S
Case.

CROMPTON J.—The modern authorities have somewhat qualified the older ones, but I do not wish to pledge myself to the view taken as to the nature of the false token, which would amount to a cheat at common law. I would be inclined to adopt the view taken by the rest of the Court, but do not pledge myself to it. I concur in the judgment that this conviction cannot be sustained, upon the grounds stated by the Chief Justice.

Conviction quashed.

1858.

REGINA v. AARON MELLOR.

On a trial for murder, the panel of petit jurors, returned by the sheriff, contained the names of J. H. T. and W. T. The name of J. H. T. was called from the panel as one of the jury, and J. H. T., as was supposed, went into the box, and was duly sworn as J. H. T. without challenge. The prisoner was convicted. The following day it was discovered that W. T. had by mistake answered to the name of J. H. T., and that W. T. was really the person who served on the jury.

Held, by Lord CAMPBELL C. J., COCKBURN C. J., COLERIDGE J., MARTIN B. and WATSON B., that there had been a mistrial, and that the Court for the Consideration of Crown Cases Reserved had jurisdiction to set aside the verdict and judgment; and (*dubitante* COLERIDGE J. and MARTIN B.) that the Court ought to order a *venire de novo* to issue.

Held, by ERLE J., CROMPTON J., CROWDER J., WILLES J., CHANNELL B., and BYLES J., that there was no mistrial.

Held, by POLLOCK C. B., ERLE J., WILLIAMS J., CROMPTON J., CROWDER J., WILLES J. and CHANNELL B., that this was not a question of law arising on the trial over which the Court had jurisdiction.

Query, whether the objection made would be matter of error.

THE following case was reserved by WIGHTMAN J.

At the last winter gaol delivery (*December* 1857), at *Liverpool*, Aaron Mellor was convicted of murder, and sentenced to death; but execution has been respite until the opinion of the Court of Criminal Appeal is taken as to the effect of a mistake which occurred upon the trial, but which was not discovered until the day after.

The panel of petit jurors returned by the sheriff contained the names of two persons, *Joseph Henry Thorne* and *William Thorniley*.

The name of *Joseph Henry Thorne* was called from the panel as one of the jury to try the case of *Aaron Mellor*; and *Joseph Henry Thorne*, as was supposed, went into the box and was duly sworn as *Joseph Henry Thorne* without challenge or objection. It was however discovered the next day, and after the prisoner had been convicted, that *William Thorniley* had, by mistake, answered to the name of *Joseph Henry Thorne* when called, and had gone into the box and been sworn as *Joseph Henry Thorne*, the

prisoner having been offered his challenge when the person called *Joseph Henry Thorne*, but who was really *William Thorniley*, came to the book to be sworn.

1858.

MELLOR'S
Case.

The mistake appeared to me important, as the prisoner might have had very substantial ground of challenge of *William Thorniley*, though none of *Joseph Henry Thorne*, whose persons he might not know, and such mistake, whether wilful or accidental, would virtually render the right of challenge nugatory. A case is reported in a note to the case of *Hill v. Yates* (12 East, 231), and is called *The Case of a Juryman*, in which it is said to have been held, in 1783, by all the Judges, that such a mistake as that in question is not objectionable as a mistrial or in arrest of judgment, or upon writ of error, but is ground of challenge only.

As however the objection is that, by the mistake, the prisoner's right of challenge may be rendered nugatory, I did not feel perfectly satisfied with that decision, and have reserved the point for the consideration of the Court, and have respited the execution of the sentence upon the prisoner until the Court has given judgment.

WM. WIGHTMAN.

This case was argued 23rd *January*, 1858, before Lord CAMPBELL C. J., COCKBURN C. J., POLLOCK C. B., COLERIDGE J., WIGHTMAN J., ERLE J., WILLIAMS J., MARTIN B., CROMPTON J., CROWDER J., WILLES J., WATSON B., CHANNELL B. and BYLES J.

Sowler appeared for the Crown, and *Fernley* for the prisoner.

Fernley, for the prisoner, contended that, the prisoner having been deprived of his challenge, there had been a mistrial.

The learned counsel referred at some length to the

1858.

MELLOR'S
Case.

decided cases bearing upon the question ; but as all those cases are mentioned and observed upon in the judgments subsequently delivered, it is not thought necessary here to refer to them.

Sowler, for the Crown. The warning to the prisoner of his right of challenge seems to be given with the greatest precision and accuracy in Mr. Justice *Talfourd's* edition of *Dickinson*. That form runs thus : " These good men, whose names you shall hear called, *and who do appear*, are the jury, who are to pass between our Sovereign lady the Queen and you upon your trial, [or, upon your respective trials,] if, therefore, you would challenge them, or any or either of them, your time is, as they *come to the book* to be sworn, and before they are sworn, and you shall be heard."

Great stress must be laid on the *personal* appearance of the juror ; and there is a very pregnant meaning in the words " and who do appear." In ancient times, a large folio Bible, containing the Gospels, was placed upon a stand in the view of the prisoner. The jurymen, who occupied a space set apart in the Court, came forward, one by one, and placed their hands upon " the book,"—they " came to the book to be sworn ;" and " when they came to the book" the prisoner had a full view of " the peer" that was to try him. He could scan his countenance, and mark his demeanour. Mr. *Tomline*, in his *Law Dictionary* (borrowing from *Blackstone*), in the first volume, title " Jury," IV., 1, 2nd column, when speaking of the right of peremptory challenge says, " This is grounded on two reasons : viz., the sudden impressions and unaccountable prejudices which everybody is apt to conceive on the bare looks and gesture of another ; and the consideration that the very questioning a person's indifference may provoke resentment."

The right of challenge is to the person of the

juryman; and the prisoner, in this case, saw the juryman who was to try him, and did not exercise his right of challenge. The juryman was on the panel, and duly summoned by the sheriff; the prisoner has not been damnified, and there has been no mistrial.

1858.

MELLOR'S
Case.

Fernley replied.

LORD CAMPBELL C. J.—There may be a question whether we have jurisdiction to decide the point submitted to us. This Court sits exclusively under the authority of the 11 & 12 *Vict.* c. 78., which enables a Judge to reserve any question of law, which shall have arisen on the trial, for the consideration of this Court.

In this case no objection was made on the trial. The trial was concluded, and the Judge passed sentence of death on the prisoner; but on the following day it was discovered that this mistake had occurred. It seems to me that there is great difficulty in saying that it comes within the statute, as a question of law arising on the trial.

Cur. adv. vult.

LORD CAMPBELL C. J.—In this case I am of opinion that under the statute 11 & 12 of *Victoria*, cap. 78, we have jurisdiction to consider and decide the question submitted to us by the Judge who presided at the trial. Although the question was not discussed, the facts upon which it arises had occurred during the trial, and the Judge, while still acting under the commission, respited the execution of the sentence, and reserved the question for the opinion of this Court. It therefore seems to me to be “a question of law which arose at the trial.” The salutary operation of the statute would be greatly impaired if it were confined to questions of law which had been openly

1858. discussed during the trial. Since the statute passed,
MELLOR'S Judges have usefully reserved under it questions as
Case. to the admissibility of evidence which had not been
discussed during the trial ; and if the question might
have been discussed before the sentence was pronounced I think that the Judge, acting under the commission, has authority to reserve it and to respite the execution of the sentence. I would further observe that the question reserved is one purely of law, wholly irrespective of the merits, being, not whether the verdict was right, but whether, in point of law, the tribunal before which the trial took place was duly constituted. After deep and anxious deliberation I feel bound to say that in my opinion there has been a mistrial, and that there ought to be a *venire de novo*. By the law of *England*, on a trial for felony, there is allowed to the prisoner not only a challenge for cause to any juror who may be called upon his trial on the ground of disqualification or partiality, to be established by evidence, "but," says *Blackstone*, "an arbitrary and capricious species of challenge to a certain number of jurors without showing any cause at all, which is called a peremptory challenge, a provision full of that tenderness and humanity to prisoners for which our *English* laws are justly famous." The importance attached to this privilege is illustrated by the solemn warning which, according to established procedure, the clerk of assize gives to the prisoners when the jury is to be impannelled. By the rules of law respecting the officer by whom the jury shall be returned and the qualification of jurors, the utmost anxiety is shown that juries should be properly constituted, and it has been by a strict attention to the spirit of these regulations that trial by jury in *England* has continued to be held in reverence by the people. But this prisoner, *Aaron Mellor*, has

been tried and found guilty by a juror, *William Thorniley*, to whom he had no just opportunity of offering a challenge, either peremptory or for cause. The clerk of assize said to the prisoner:—"These good men who have been called are to pass between our Sovereign lady the Queen and you on your trial; therefore, if you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you will be heard." *William Thorniley* had not been called, and never was called on this trial; yet he was sworn, and he served upon the jury, he having come to the book to be sworn when the name of *Joseph Henry Thorne* was called. The prisoner had good reason to suppose that it was truly *Joseph Henry Thorne* who then appeared. Although the prisoner is desired to look upon the jurors, the law cannot presume so unreasonably (and which in a great majority of cases would be contrary to the fact) as that the prisoner shall know the face of every juryman returned upon the panel. But without knowing the face either of *Joseph Henry Thorne* or of *William Thorniley*, this prisoner might have had reason to believe that *Joseph Henry Thorne* was impartial and that *William Thorniley* had a spite against him. When *William Thorniley* appeared, the name of *Joseph Henry Thorne* had been called and *William Thorniley* was allowed to be sworn and to serve. But if his true name of *William Thorniley* had been called the prisoner might have challenged him either peremptorily or for cause. There having been no proper opportunity to challenge *William Thorniley*, he had no right to serve as a juror on the trial of this prisoner, more than any stranger who might have got into the jury-box after the jury was sworn. In the jury-box there never were more than eleven jurymen whom the law could recognise. The

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

objection is in no degree weakened by the fact that *William Thorniley's* name was upon the panel, as he was not called on the trial of *Aaron Mellor*. But it is most material to bear in mind that this is not a case of mere misnomer, where, there being some mistake upon the panel in the name of a jurymen regularly summoned and sworn, it may still be truly said, "*constat de persona.*" *Joseph Henry Thorne*, whose name was called and who did not appear, was an existing person and a different person from *William Thorniley*, who did appear, who was sworn, and who served. Upon principle, therefore, there seems to me to have been a mistrial, as much as if all the twelve jurors who served had been different persons and had different names from the jurors called by the clerk of assize, in which case the prisoner would have been entirely deprived of his right of challenge. I presume that to constitute a valid trial it is quite as essential that the jury should be clothed with legal authority as the Judge. But if it should be discovered in a capital case (after sentence of death had been passed) that by some mistake the name of the Judge who presided had not been inserted in the commission, would not this be a mistrial, without any proof that the prisoner had been prejudiced by the mistake? To guard against such a mistake the commission is always read in open Court at the commencement of the assizes; and I have heard of a Judge who was so scrupulous that he would always verify the fact by ocular inspection that his name was in the commission, from an apprehension of the terrible responsibility he would incur if his name should have been omitted. When the authorities on this question are examined they appear to me strongly to support the position that in this case there has been a mistrial. They make the distinction between the mere misnomer of a

juryman regularly summoned and the case of there being in existence two different persons, and one of them appearing and serving instead of the other, who ought to have appeared and served. With the exception of *Hill v. Yates* (a) I am not aware of any decision, even in a civil case, that if a person improperly answers, and is sworn and serves as a juryman, instead of another, this is not a mistrial. It was held in *Fermor v. Dorrington* (b), and in *Hasset v. Payne* (c), that where one person was named in the panel and another in the *distringas*, and the latter served on the jury, it was a mistrial. And the authority of these cases is fully recognised by *Bayley J.* in *Rex v. Tremearne* (d). To remedy the strictness that had once prevailed, which was extended even to misnomer, stat. 21 Jac. 1. c. 13. was passed, by which it was enacted "that no judgment shall be stayed or arrested after a verdict because any of the jury who tried the issue is misnamed, either in the surname or addition, in any jury process, or in any return thereupon, so as upon examination it appear to be the same person who was meant to be returned," identity of person being carefully made a condition. After the statute occurred the case of *Bond v. Devys* (e), of which we have this accurate abstract from C. J. Willes (f). "In the return to the *venire* a juryman was named *Samuel*, and so in the *distringas*, but in the panel annexed he was called *Daniel*, and sworn by that name, as appears by the record, and gave a verdict for the plaintiff; though this was not within 21 Jac. 1., yet, it appearing upon the examination of the juror himself that he was the person

1858.

MELLOR'S
Case.

(a) 12 East, 229.

(b) Cro. Eliz. 222.

(c) Ibid. 256.

(d) 5 Barn. & Cr. 254

(e) Cro. Car. 563; Sir W. Jones, 448; Danvers, 330.

(f) Willes, 493.

1858.

 MELLOR'S
 Case.

returned, and that his right name was *Samuel*, and that there was no other person of that name in the parish, and by the examination of the sheriff and his clerk that it was the misprision of the clerk, who, though he had the *distringas* before him, wrote *Daniel* for *Samuel* in the panel, and the juror likewise swearing that there being a great noise in the Court when he was sworn he answered, supposing himself to be called by his right name of *Samuel*, the record was ordered to be amended and the judgment was not stayed." So cautious was the Court to ascertain that there were not two persons, one of whom had appeared and served instead of the other. But the leading case upon this subject is *Norman v. Beaumont* (a), in which Chief Justice WILLES and his brother Judges, after great deliberation, set aside a verdict for mistrial, because one of the jurymen was not returned on the *nisi prius* panel, but answered to the name of a person who had been summoned. On the trial *Richard Shepherd*, not summoned, answered as a jurymen when *Richard Geater*, who was upon the panel, was called. *Per* WILLES C. J.—“ A challenge to a jurymen supposes him capable of serving on the jury if the objection be answered; but *Richard Shepherd* was no jurymen at all.” And to the objection that it did not appear on the record, he said that in such cases where the objection could not appear on the record the fact might be ascertained by extraneous evidence. The authority of this decision is strengthened, instead of being shaken, by the next case of *Wray v. Thorn* (b), where the Court refused to set aside a verdict and grant a new trial because one of the jurors was named *Henry* in the *venire*, *habeas corpora*, and *postea*, his real Christian name being *Harry*. In a

(a) Willes, 484; S. C. Barnes, 453.

(b) Willes, 488.

most elaborate judgment Chief Justice WILLES gives this as the *ratio decidendi*:—"It appears by the affidavit which makes out the objection that the jurymen who were sworn on the jury and tried the cause were the persons who were summoned and returned and intended to be jurors in the cause, which is the very reason relied on in the statute 28 Jac. 1. c. 13." I now come to the case of *Hill v. Yates (a)*, where, a father being summoned and returned upon the panel, his son, who was not summoned or returned, answered to his father's name when the panel was called, and, having served as one of the jury on the trial, it was held that this was not a sufficient ground for setting aside the verdict as for a mistrial. Supposing this case to have been well decided, it would by no means be an authority to support this conviction, there being a manifest and important difference between the trial of a civil action and a criminal trial, in which there is a right of peremptory challenge. But I must use the freedom to say that the manner in which the decision was pronounced considerably detracts from its authority. Although there was the solemn decision of a Court of co-ordinate jurisdiction expressly in point to support the application, a rule to show cause was refused, and the question never was deliberately argued. "The Court, recollecting" (it is said in the report) "that the same objection had been taken and overruled since the case in *Willes*, though the name of the case did not then occur, refused to entertain the motion." The supposed overruling case turned out to be *The Case of a Jurymen*, to be found in the MS. book of Crown Cases determined formerly in conference by the Judges, now in my custody as Chief Justice of the

1858.

MELLOR'S
Case.

(a) 12 East, 229.

1858. Queen's Bench, and it is accurately printed in a note, 12 *East*, 230. But that case, when examined, instead of overturning *Norman v. Beamont*, will be found perfectly reconcileable with it, being founded on the distinction between misnomer and one person serving as a juryman instead of another. *Robert Curry*, the juror who served, had been summoned and was returned by the sheriff under the name of *Joseph Curry*, and there was no *Joseph Curry* summoned or returned on the panel, or who could have been mistaken by the prisoner for *Robert Curry*. *Eyre B.*, who had presided on the trial, therefore justly thought and said that "it amounted to nothing more than a mere misnomer in the panel of the juryman intended to be returned, and who did serve." Accordingly, upon a conference of the Judges, they were "unanimously of opinion that this was no ground of objection, even if a writ of error were brought—much less on a summary application." Thus, it is quite clear that *The Juryman's Case*, proceeding on the ground of misnomer of the right person who was called, does not apply to the substitution of a wrong person for the right person, and cannot be considered an authority to support the present conviction. Lord *Ellenborough* certainly does use very general and strong language, "in order" (as he says) "to put at rest the question once for all, that applications of this sort might not be made again and again." But the law of the land cannot be altered in this summary manner, and, if the existing exercise of the right of challenge really leads to inconvenience, it can only be curtailed by the Legislature. The cases which have occurred upon this subject since *Hill v. Yates*, although not conclusive, have, I think, a tendency to support the principle on which I think that our judgment ought to be for the prisoner. In *Dovey v.*

MELLOR'S
Case.

1858.

MELLOR'S
Case.

Hobson (a) a person, not summoned on the jury, having been sworn on a jury in the name of a person for whom a summons to serve on that jury was delivered, and to whose house he had succeeded, the Court held it a mistrial, and awarded a *venire de novo*. There the objection was started before the verdict was delivered, but after the case had been gone through, without any objection being taken by the counsel on either side; and *Gibbs* C. J. said: "We think that the eleven jurymen being well summoned, and a twelfth not being well summoned, and a verdict taken by the twelve, and the objection being pointed out at the time, the Court, in the exercise of their discretion to grant a new trial or not, ought to set aside this verdict and to grant a *venire de novo*." If this had been merely a case of misnomer, instead of personation, a different course would no doubt have been adopted. *Rex v. Tremearne* (b) was likewise a case of personation, and the same course was followed as in *Dovey v. Hobson*, although the mistake was not discovered till after verdict. On the trial of an indictment for perjury it was necessary to swear *talesmen* from the common jury panel, and one *J. Williams* being called, his son *R. H. Williams* (at the request of his father and without collusion with the prosecutor or defendant) appeared for him, and was sworn and served on the jury. Held that there was a mistrial, and a *venire de novo* was granted. The son was under age, and was not qualified to serve on the jury, and no doubt considerable weight was given to these circumstances; but the circumstance of a man, on trial for his life, being deprived of his right of challenge, is surely as strong; and there Lord *Tenterden* points out emphatically that

(a) 6 Taunt. 259. ⁴⁶⁰ 2 March 1854 (b) 5 B. & C. 254.

1858.

MELLOR'S
Case.

the Court would not be justified in allowing a verdict which they disapprove of to stand, from the apprehension of mischief which may hereafter arise. The most recent case referred to is *Regina v. Metcalf* (a), where, on a trial for a felony, there had been the personation of a juryman, discovered after verdict. *Maule J.* would not pronounce judgment on the prisoner although the verdict was upon clear evidence; but, without expressing any positive opinion whether there had been a mistrial, he directed the prisoner to be tried on another indictment for another larceny, on which he was regularly convicted and sentenced. The weight of authority, therefore, seems to me considerably to preponderate in favour of the prisoner, and upon the whole I am of opinion that the conviction is wrong, and that the sentence cannot legally be carried into execution. It has been suggested that we ought to require the prisoner to bring a writ of error, which might be carried by the Crown before the House of Lords. But, if we have jurisdiction to consider the question, surely we ought finally to decide it, which we can do in this Court without being perplexed by the technicalities by which a writ of error would be surrounded. The fullest powers are conferred upon us by the statute for this purpose, and the simple and expedient course seems to be at once to set aside the verdict and judgment, and to order that the prisoner may be tried before another jury properly constituted. The prisoner cannot complain of this proceeding, nor can the Crown. We have heard counsel representing the Crown in support of the conviction, and the Crown can have no wish except that justice may be satisfactorily administered. There may certainly

(a) 3 Cox, C. C. 220.

be a dread that frivolous objections to procedure in criminal cases may be encouraged by our decision ; but it is no frivolous objection that the prisoner, on a trial for murder, was without any fault of his own deprived of his right to challenge one of the jurymen who tried him, and I hope the Judges may safely rely upon their own efforts, and, if necessary, upon the aid of the Legislature, to repress mere technicalities, which seek to screen guilt instead of protecting innocence. What justice requires, in my opinion, is that we order an entry to be made on the record, setting forth the case reserved by the Judge, and the proceedings thereupon in this Court, and that in our judgment the party convicted ought not to have been convicted, and that a *venire de novo* issue, so that he may be tried for the offence for which he stands indicted at the next gaol delivery for the county of *Lancaster*, and that he be detained in custody to take his trial accordingly.

1858.

MELLOR'S
Case.

COCKBURN C. J.—The questions that arise in this case appear to me to be involved in very grave and serious doubt. I have doubted, in the first place, whether we have jurisdiction under the statute to enter upon the inquiry at all ; and, in the second place, whether, if we have, the facts which are stated for our consideration show that there has been a mistrial. But upon the whole I am led to concur in the conclusion to which my Lord Chief Justice has arrived. I am disposed to think that if the fact that one of the jury had answered to a wrong name, and had been sworn by mistake, had come to the knowledge of the learned Judge during the course of the trial instead of afterwards, it would have been the duty of the Judge to discharge that jury and to have another impannelled ; and, consequently, by a liberal construction of the statute which gives us jurisdiction,

1858.

MELLOR'S
Case.

—and I think that, looking at the purposes for which it was passed, we ought to give it a liberal and enlarged construction—this case may be considered as within our jurisdiction. As regards the second question, namely, whether there has been a mistrial, I own that it is not without considerable hesitation and reluctance that I come to the conclusion in the affirmative, because in this case it seems to be admitted that no practical injustice of any sort or kind has been done to the prisoner; he has sustained no wrong, and, so far as we are made aware, he has preferred no complaint, nor is it alleged on his behalf that he has been in any way prejudiced or wronged by what took place at the trial. Nevertheless there can be no doubt that a prisoner might sustain a very serious prejudice in such a case as the present by a state of circumstances by no means inconsistent with probability, and which may very readily be stated; for it might well be that a prisoner, knowing that there was on the panel, and summoned to serve at the assizes, one man who was his foe and another man who was his friend, and having made inquiries with respect to them might have ascertained one man had the strongest opinion of his guilt, while the other entertained a favourable opinion of his innocence, and might, therefore, have the strongest reason for challenging the one man and not the other; and he might, by such a mistake as this, be, as I have said, most seriously affected in the result by having on the jury who tried him a man to whom he would have objected had he known that he would be called; while, on the other hand, he thought he was being tried by a man he believed to be favourable to him. Now that which presses strongly on my mind is this, that for such a case I see no remedy. It may be said, indeed, application may be made to the Crown if it can be shown

that a prisoner has sustained on his trial such a prejudice as that to which I have referred, and that a pardon might be obtained. Such a course however would be attended with very serious inconveniences ; in the first place a guilty man might, under those circumstances, escape with perfect impunity ; and, on the other hand, an innocent man would be placed at the mercy of the Crown, or of those who happen at the period of the application to be its advisers ; and I believe that, so far as the constitution of the jury is concerned who are to pass between the Crown and the prisoner upon his trial, perhaps, as in this case, for life or death, the prisoner ought not to be at the mercy either of the Crown or its advisers ; but the constitution of the jury should be such as he by law has a right to have it. Now then, seeing no remedy in such a case where there would be actual wrong or prejudice, except by holding there was a mistrial, it seems to me it is impossible to make a distinction between a case where the prejudice to a prisoner is one that exists in theory and the case where it exists in practice. I wish there were some procedure in the administration of the criminal law, whereby such a case might be disposed of on its intrinsic merits, where the fact might be ascertained, either by reference to the Judge who presided at the trial, or by reference to this Court if it were necessary, whether in reality the prisoner had sustained prejudice or not. But at present no such course presents itself, and the only mode in which such a practical grievance and wrong as that to which I am now referring can be redressed is, by holding this matter with reference to the constitution of the jury to be *strictissimi juris* ; and that, as the law has given the prisoner a peremptory right of challenge against any man to whom he may entertain even the most imaginary objection

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

which could or might be taken, that he should not be prejudiced by having to try him a man to whom he would have objected if he had known he was called upon the jury. Under all these circumstances, though I own with regret, that, in a case where no practical wrong or prejudice is alleged to have existed, we should defeat justice by a technicality of this sort being held to amount to a mistrial, I do not see my way to an opposite conclusion, and I think that, at all events, *in favorem vitæ*, looking at the serious consequences that would ensue to the prisoner if the contrary was held, the wisest course is to hold that there has been a mistrial, and that there should be a *venire de novo*.

POLLOCK C. B.—In this case it appears that after the trial was over, and after sentence had been pronounced on the prisoner, it was stated on the following day, to the Judge who presided at the trial, that one of the jurors returned on the panel had answered to a wrong name, and had been sworn without having been called. No inquiry seems to have taken place on oath, but the matter has been assumed to be true on the statement of the officer of the Court; and neither the Judge who presided at the trial, nor this Court, has any judicial knowledge of the fact which gave rise to the objection, if it be one. Now apart from the statute which created this tribunal, namely, the 11 & 12 *Vict.* c. 78., the objection, if any, could not have been taken except on a writ of error, and the error, if error it be, is error in fact and not error in law. In my judgment the statute was clearly not intended to supersede the Court of error, and to confer upon this Court all its functions. This is perfectly clear from the 5th section of the Act which contains a provision as to cases before a Court of error, and gives to that Court a power it did not previously possess; and in one case

which, but for another purpose, I shall presently have to allude to, it was expressly held that this Court ought not to interfere upon a demurrer and deprive the prisoner of his right to a writ of error; and therefore I consider that the Court of error by the decision in that case, and by the express words of the statute, remains clothed with the full authority that it possessed before that statute was passed. The authority and jurisdiction of this Court is in my opinion limited to matters of law occurring upon the trial, of which the Judge can take judicial notice; and, in providing for giving effect to the decision of this Court and the certificate founded thereon, there are express directions given what shall be done in each case. It appears to me that the statute under which we are now sitting contemplated the final determination of the matter, and never contemplated any new trial or any *venire de novo*. The language of the Act I think, would naturally lead to that conclusion: it is this. "And the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon"—this is what they have power to do—"to reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record that, in the judgment of the said justices and barons, the party convicted ought not to have been convicted." Such I understand to be one of the entries my Lord Chief Justice of the Court of Queen's Bench proposes to enter upon the present occasion. Or they are "to arrest the judgment, or order judgment to be given thereon at some other session of oyer and terminer and gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as

1858.

MELLOR'S
Case.

1858.
MELLOR'S
Case.

they shall be advised, or to make such other order as justice may require." My Lord Chief Justice appears to think that this authorizes us to order a *venire de novo* to issue. Upon the best consideration I can give to the question it seems to me to confer no such authority. It appears to me that the statute never contemplated any new trial, and I think that will be clear when we come to consider what are the provisions made in the Act, for they are very express and direct, as to what shall be done upon the certificate going down to the Court in which the point arose. One could not expect, the statute being so recently passed, to find much authority upon the question; but I observe that *Parke B.*, now Lord *Wensleydale*, has expressed an opinion upon what is the meaning of these very words, namely, "shall make such other orders as justice may require," in the case which I alluded to just now, *Regina v. Faderman and others* (a), in which the prisoner was left to his writ of error upon the demurrer, the Court thinking they had no power to deal with the demurrer. *Parke B.* says this (b): "The words 'to make such other order as justice may require' do not assist you; they only enable this Court to order a party to be let out on bail, or to do any other thing *of the like kind* which justice may seem to demand." If this part of the Act, which enables us to make any other order such as justice may require, is to be taken to apply to a case like the present, I should be glad to know why, if we can award a *venire de novo*, we cannot grant a new trial in any case where improper evidence has been received, but which in reality was not calculated to have any influence upon the verdict. If we are to award a *venire de novo* because the prisoner may have

(a) 1 Den. C. C. 565.

(b) Ibid. 568.

lost some benefit, of which there is no suggestion before us, then, I would ask, in a case where, in the opinion of this Court, improper evidence has been received, and where an entry upon the record would be that the evidence having been so received the accused party was improperly convicted, what does justice require in such a case? Why, manifestly, that the prisoner, guilty of some atrocious crime, should not thereby escape justice; and yet I apprehend it will be conceded on all sides (and I do not imagine from the communications that have taken place among us that one single member of this Court is of a different opinion) that, however much we might all think that justice would require a new trial, we should be incompetent to grant it. The Act of Parliament provides expressly what shall be done where the conviction is vitiated; we cannot order a new trial in such a case; we cannot direct a *venire de novo* to issue; we can only vacate the conviction. And now I come, therefore, to the second point which I alluded to, namely, that of providing for giving effect to the decision of the Court and the certificate founded upon it. It must be signed by the chief of the Court who may happen to preside here. It is expressly provided by the statute what shall be done in each particular case. That is to be found in the latter part of the second section, and I will read the very words of the section. "And the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons for the execution of the judgment as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment if the judgment shall be reversed, avoided, or arrested." And this difficulty may arise,—if we send back a certificate that

1858.

MELLOR'S
Case.

1858. this conviction is bad, I am not sure that the man

MELLOR's would not be entitled to a *habeas corpus* to know why
Case. he is detained, and why the sheriff does not instantly
discharge him ; and it might be a most serious
question whether he ought not, from the plain, mani-
fest and clear words of the Act, instantly to be
discharged. There is no provision made for that.
There is provision made for everything which is really
contemplated by the Act. The sheriff is called on to
discharge the prisoner if the conviction is avoided ;
in the event of the judgment being affirmed and
amended, then execution is to issue upon the judgment
so affirmed and amended ; but there is not a syllable
in the Act that points to any power in the sheriff or
anybody else to detain the prisoner, or in any Court
to try him in the event of a *venire de novo* issuing.
On these grounds, in my judgment, this Court is not
competent to award a *venire de novo* ; and I think the
remark made in a case I have already cited, that the
prisoner ought not to be deprived of his writ of error,
applies with equal strength to the prosecution. Why
are we to dispose of a matter of fact which has never
been inquired into upon oath ? There is no return of
any affidavit, or any statement made on oath by any-
body that the facts are true ; and why is the Crown
to be deprived of the opportunity it would have on a
writ of error to say and to prove that the suggestion
made in the case before us is not founded in fact ; or
that there was fraud between the accused and the juror
which possibly might very much interfere with the
decision of the Court ? In my judgment the prisoner
ought to be left to his writ of error, and as that is my
opinion in point of law, giving to this statute my most
anxious and deliberate consideration, I abstain from
giving any opinion whether a writ of error ought or
ought not to be granted, or what ought to be the

result of a writ of error if it were granted, assuming the facts to be true. These matters are not in my judgment properly now before the Court; and I think it best to abstain from giving any opinion upon them. In my judgment this Court has no authority to interfere, and I am clearly of opinion, without the slightest doubt or hesitation, that this Court has not any power to award a *venire de novo*, and in that way grant a new trial. I think the awarding of a *venire de novo* belongs exclusively to a Court of error. This Court, by otherwise construing the words which have been referred to, "to make such order as justice may require," would not be expounding the Act, which alone it has the province to do; but would in fact be legislating and taking to itself an authority which the Legislature never intended to confer upon it.

COLERIDGE J.—I have considered this case with all the attention I have been able to give to it, and which its importance deserves, and certainly I should have expressed the conclusion at which I have arrived, it being a very clear one in my own mind, with considerable confidence, but for the doubts expressed by the Lord Chief Justice of the Common Pleas, and which I know prevail amongst several members of the bench, and the strong opinion just given by the Lord Chief Baron. Still I remain of opinion that this is a case within the competency of this Court to consider; and I arrive at my conclusion as to this and as to many parts of the case that I shall have to touch on perhaps by a shorter mode than has been adopted by my Lord CAMPBELL on the one hand, or by the Lord Chief Baron on the other; because I do it very much upon a consideration of the statute under which we are sitting. Now, if this be a question of law which has arisen upon a trial, and if the Judge who presided at the trial has reserved a case for us, it

1858.

MELLOR'S
Case.

1858. appears to me that it must be within our jurisdiction
MELLOR'S to consider it. That there was a question of law I
Case. think hardly admits of an argument. If the prisoner,
being aware of the fact at the time, had raised the
objection during the trial, or if, on the other hand, the
counsel for the Crown had then done so, who can doubt
but the decision of the point would then have been
a question of law for the Judge to decide? Well then,
did it arise at the trial? It was not agitated at the
trial beyond all doubt; but construing this Act of
Parliament, as I think we are bound to do, liberally,
I am of opinion that, where the subject-matter of dis-
pute or question is connected with or took place at the
trial, whether it be considered at the time, or whether
it be considered at a later period, it must be said in
point of law to have arisen at the trial. Now let me
illustrate this by a circumstance which I am sure has
occurred within my own recollection on several occa-
sions in this Court, though undoubtedly it has never
been thought worth while to discuss it, and therefore
I do not cite any of the cases in which it has
occurred as authorities; but let me suppose the case
of a prisoner undefended, who is tried at the
assizes before a Judge; he has no counsel; no
difficulty arises at the time in the mind of the
Judge; the charge is proved; the Judge sums up,
and the prisoner is convicted; but the next day, or
a day or two after that, the Judge, upon reconsidering
the matter, is of opinion that he has seriously mis-
directed the jury on a point of law, or that he has
committed a mistake by omitting something which is
of great importance to the prisoner, could it be said
that the Judge in such a case had no right to reserve
a case for the opinion of this Court under the Act of
Parliament? And could it be said that the point,
which beyond all doubt ought to have been deter-

mined at the trial, and which did present itself for consideration at the trial, is not a point that arose at the trial? I think if we were to hold that a case of that nature is not within the statute, we should most grievously limit the construction of this Act of Parliament which, as much as any other that has passed for a long period of time, ought to receive the largest and most liberal construction. Now if I am right in the suppositious case that I have put, it appears to me that the question now before us was one that arose at the trial. It is asked, how are we to arrive at our knowledge of the facts of the case? and how can we know that the facts are correctly stated for our consideration? My Lord Chief Baron said that the fact was merely mentioned to the Judge, and was a matter of which he had no judicial knowledge, and that in that view nobody can now take on himself to say whether or not the facts which are presented for our consideration are correctly stated. Now the Judge says that it was discovered the next day that so and so took place, and I apprehend that we are bound to give credence to the statement of the Judge, and that whatever the Judge presents before us we must take as a fact. The Judge does not put it on some uncertain and hearsay evidence of a matter that has come to him, but he states to us that it was discovered the next day that so and so had taken place, and what the Judge so states must be taken incontrovertibly to be a fact. It is suggested this is not a record, but we have no more power of contradicting the statement of a learned Judge in a case reserved for our consideration, than we have the power of contradicting any allegation upon a record. Now, if the statement of the Judge be the mode by which we are to arrive at the facts, it seems to me, I confess, to relieve the case under consideration from much of the technicality that might otherwise be

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

supposed to belong to it; and for that reason it is, and without at all expressing an unfavourable opinion of the view of the cases taken by my Lord Chief Justice, I take the liberty of passing them by, and taking my stand on the Act of Parliament. I care not at all whether this would have been matter of challenge, or matter to be assigned on error, or whatever it may be, if it be brought before us for our consideration we are to say what are the legal consequences of the facts presented to our notice. If that be so, it appears to me that there has been clearly in this case a mistrial, and that justice requires us to interfere, and to say that there has been such a mistrial; and though it may be extremely possible that in this case no injustice has been done, I must take leave, with reference to what fell from the Lord Chief Justice of the Common Pleas, to state that in my opinion it is hardly right to judge of the importance of any question of law presented to a Court of justice by considering whether, in any particular case, injustice may or may not have arisen: we know nothing about that; we only know that under a particular state of circumstances injustice may have arisen, or hardship may have resulted; and, if that be so, the prisoner is at liberty to stand upon that ground, and say I am not to be submitted to a state of things in which injustice or hardship may have arisen. That that may have been the case in the present instance is too plain to require any observation at my hands, and therefore I pass on from that part of the case. The decision to which I have come may possibly open the door to abuses and to fraud and collusion, if you please, from persons going into the box and answering to names of other persons; but I very well remember my Lord Chief Justice *Abbott* said, in the case of *Rex v. Tremearne (a)*, that might be so, and no doubt

(a) 5 B. & C. 254; S. C. 7 D. & R. 684.

personation might take place and mistakes might arise; or there might be collusion, and so injustice might arise; but that we must do our best to prevent such things; but above all we must lay down the rule straightly, and take care that the rule be such as to secure, if properly carried out, the true ends of justice. It only then remains for me to consider what we ought to do in this case. I listened with great attention to the form of entry proposed by my Lord CAMPBELL towards the conclusion of his judgment. I am not prepared to say that I see anything to find fault with in it, but it appears to me that it is perhaps hardly necessary for us to go so far as to say anything about a *venire de novo* being awarded. I do not say that upon the grounds on which my Lord Chief Baron relied on, namely, that the fifth section of the Act, and what is there said about a court of error having the power to award a *venire de novo*, show that we have no such power, because that section seems to me to be placed in the Act of Parliament for a very different purpose. No doubt the statute does not take away the writ of error. It only applies to cases where the Judge chooses to exercise his discretion in reserving a question of law, and therefore there may be a writ of error notwithstanding the statute. Undoubtedly it acknowledges the power of a Court of error, but it does not at all interfere with that Court; nor does the circumstance of the Court of error having the power of considering a question of this kind, show that this Court has not the power also. I think, if we pronounce that there has been a mistrial, it is precisely the same as if there had been no trial; all that has passed, and all that has been done, is void and at an end, and the prisoner's name may be entered on the calendar again as a person waiting to be tried. I do not apprehend that any

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

special award of a *venire de novo* is necessary to carry out the ends of justice; nor, on the other hand, am I afraid, in reference to what has been suggested in the course of the discussions we have heard, that the record, if completed in the manner suggested, would be an erroneous record, because I think that whatever we do lawfully under this Act of Parliament never can be assigned as a cause of error in any Court of error, for the Act of Parliament will protect and make legal whatever it authorizes us to do. Therefore, and without saying there should be an award of a *venire de novo*, I am, upon all these grounds, of opinion that there has been a mistrial in this case; that the conviction was wrong, and ought not to stand; and that the prisoner must be again tried for the offence. And let me, before I conclude, observe, that in so saying, and in so determining this question, no ends of justice are defeated. Such a decision merely submits the prisoner to a second trial. It does not follow that there would be an acquittal now any more than there was on the former occasion; it merely says that the man has not been properly tried, and he is now to be submitted to his trial.

WIGHTMAN J.—The opinion which I entertained at the time when this mistake was discovered remains the same. The mistake was not in the name of a juror, which would be a misnomer only, but of a person. It is the case of one juror, to whom the prisoner at the bar might have had an objection, answering to the name of another juror to whom the prisoner might have had no objection, and being sworn and trying the case in the name of such other juror. Such a mistake might render the prisoner's right of challenge nugatory; and it is settled law that unless a juror be challenged before he is sworn he cannot be challenged afterwards, except by consent.

It may be that if the mistake had been discovered before the verdict, I might have discharged the juror with respect to whom the objection had arisen, and called another juror, and then have heard the witnesses over again; or I might have given the prisoner the liberty of challenging the juror who actually served with the consent of counsel for the prosecution. The mistake, however, though arising upon the trial, was not discovered until after verdict. It appears to me that this was a case of mistrial, and that if the privilege of challenge be of any value at all, it might be utterly defeated if this objection does not prevail. This is distinguishable from *The Case of a Jurymen*. That case seems to have been one of misnomer only, the right man having answered to a wrong Christian name, there being no other jurymen of the same name on the panel. In the present case *Joseph Henry Thorne* was called, and this person, whom the prisoner was competent to challenge, and who was supposed to have been sworn and to have tried the prisoner, neither was sworn nor did he try the prisoner. The case seems to me, in effect, much the same as if he had been tried by eleven only. The consequence is a mistrial, and the prisoner can be tried again, as there never was in legal contemplation any jeopardy upon the first trial, which is not to be considered a trial at all. It may be, and no doubt it is so, that such an objection as this may be a ground of error, and might be taken upon a writ of error; but the question is whether, notwithstanding it might be a ground of error, this Court has not jurisdiction. Now I refer to the recital in the statute 11 & 12 *Vict. c. 78.*, under which this Court sits. It is called "An Act for the Further Amendment of the Administration of the Criminal Law," and it commences with this recital: "Whereas it is expedient to provide a better mode

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

than that now in use of deciding any difficult question of law which may arise in criminal trials in any court of oyer and terminer and gaol delivery, and to make further amendments in the administration of the criminal law." This act was passed for the express purpose of providing a better mode of deciding difficult questions of law ; no doubt before the statute difficult questions of law arising upon a trial might be ground for a writ of error ; but this statute was to provide a better and shorter mode of deciding such questions ; and therefore it seems to me that the power of this Court is by no means limited in the manner suggested by *Parke* B. in the case referred to by the Lord Chief Baron. The provision of the Act is that any question of law arising upon a trial may be reserved for the consideration of this Court, and this Court has full power to determine the question and avoid the judgment. The words of the statute are " to reverse, affirm, or amend any judgment which shall have been given," or " to avoid such judgment." Now this is one of those cases in which the Court has power to avoid the judgment that has been given ; and then we may " make such other order as justice may require." It seems to me that the terms of this statute give most extensive powers to this Court : we may avoid the judgment and may " make such other order as the justice of the case may require." On a full consideration of those words it seems to me this Court has power, if we think the case is one in which we ought to exercise it, to make such order as we think fit and justice may require. What reason is there why, in this case, there should not be another trial ? It seems to me that this Court has full and ample jurisdiction to avoid the judgment, or, in the terms of the Act, to make such order as justice may require ; and, that being so, I think there may and ought

to be another trial. On these short grounds I am of opinion that this is a case of mistrial, and that we should avoid the judgment that has been given and order another trial.

1858.

MELLOR'S
Case.

ERLE J.—I will first take the substantial question, whether a writ of error lies because *William Thorniley*, by mistake, answered and was sworn on the jury when *Joseph Thorne* was called by the officer, both names being on the panel, and both persons being duly qualified to serve, and no actual prejudice to any party being shown. It is alleged that the prisoner may have intended to challenge *Thorniley*, and have lost the opportunity because the name of *Thorne* was called, and that this possible loss of challenge is error vitiating the trial. No authority has been adduced to show that such a mistake has ever been held to be a ground of error; and, although there are many instances at *Nisi prius* where there has been a misnomer of a jurymen, and where there has been a personation of a jurymen by an unqualified man not on the panel, no case has been cited where the man who served and the man who was called were each on the panel and each qualified to serve, and no case has been cited where either misnomer or personation was introduced on the record, by assigning it as error in fact to be proved by evidence extrinsic to the record. Among the cases cited *Norman v. Beaumont* (a) was much relied on; but it falls within the description above given. There one *Yeater* was returned on the panel, and *Shepherd*, who was not returned, answered to *Yeater*'s name by mistake and was sworn; and, upon showing cause against a rule for a new trial on this ground, it was contended that the record was right, and the Court could not notice a defect not appearing thereon; but the judgment

(a) Willes, 484.

1858.

MELLOR'S
Case.

was that, in cases where the objection could not appear on the record, the Court always (that is on motions for new trials) admitted affidavits as in the case of any misbehaviour of a jury. In the old cases the motion in arrest of judgment is founded on a variance in the name of the same juror appearing in different parts of the jury process, and if any extrinsic fact is brought forward, it is by affidavit on an application to the discretion of the Court, either to amend or grant a new trial at *Nisi prius*, such application to the discretion of the Court being distinct from a ground of error entitling to a judgment *ex debito justitiæ*, and being in the nature of the application to the discretion of the Crown for an act of mercy. I cite the cases of variance appearing on the record from the collection in *Wray v. Thorn* (a). In *Desply v. Spratt* (b) *Thomas Baker* in the *venire* was called *Thomas Carter* in the *distringas*. In *Fermor v. Dorrington* (c) *Taverner* on the return to the *venire* was *Turnor* on the *distringas*. In *Dousby v. Willott Gregory* on the return to the *venire* was *George* on the *distringas*. In *Cro. Jac.* 116, *Constantinus* on the return to the *venire* was *Constantius* on the panel. In *Codwell's case* (d), *Palus* on the return to the *venire* was *Paulus* on the *distringas* and *postea*. In these cases the judgment was arrested on account of the variance appearing on the record. In the more modern cases the application was for a new trial on affidavit. It was so in *Norman v. Beaumont* above cited. So also, in *Wray v. Thorn* (a) *Henry* on the *venire* and other jury process was shown by affidavit to be *Harry*; the judgment is that there should be no new trial. The Court says that the record being right, and no variance appearing thereon, the judgment

(a) *Willes*, 488.(b) *Cro. Eliz.* 57.(c) *Cro. Eliz.* 222.(d) 5 *Co.* 42 *b.* ante, 43 *a.*

cannot be arrested or reversed on error, and that it would be unjust to grant a new trial, there being no objection to the verdict, and it appearing by the affidavit that the juryman who was sworn was the person who was returned, and WILLES C. J. adds, at the close, "This case is very different from *Norman v. Beamont*, for there a person who was never summoned was sworn in the room of one who was summoned." According to these authorities a misnomer appearing on the record is always ground of error if not amended, but it is no ground of new trial if the person who was sworn was a person that was summoned and no injustice was done. The cases further show that if a person not summoned was sworn in the name of one who was summoned, it might or might not be a ground of new trial, according to the discretion of the Court. Thus in *Hill v. Yates* (a), where the father was summoned and the son answered and was sworn, Lord *Ellenborough*, expressly because a new trial was for the discretion of the Court, refused the rule, there being no pretence of any prejudice, and the danger of abuse both in civil and criminal cases being incalculably great if such a motion prevailed. So in *Rex v. Tremearne* (b), where the father was summoned and the son answered and was sworn, and it was also shown that he was an infant without qualification of estate, the Court thought these facts a sufficient ground for granting a new trial. And in *Dovey v. Hobson* (c), where *Maynard* answered to the name of *Russell*, he having received a summons directed to "*Russell* or the inhabitant of *Russell's* house," and he having succeeded to *Russell's* house, the Court granted a new trial on the alleged ground that the objection had been taken before verdict, but

1858.

MELLOR'S
Case.

(a) 12 East, 229.

(b) 5 B. & C. 254.

(c) 2 Mar. 154; S. C. 6 Taunt. 359. *L. C.*

1858.
MELLOR'S
Case.

probably because the verdict was unsatisfactory, as the report states that it was against the summing up of the Judge. These cases thus show that if a person not upon the panel answers to the name of a person on the panel, such personation may or may not be ground of new trial, according to the discretion of the Court. They do not support the notion that if a juryman on the panel by mistake answered to the name of another juryman thereon, it would be ground of new trial, much less do they indicate that such a mistake could be made ground of error. Moreover, as they relate to verdicts at *Nisi prius*, they differ materially from a verdict under a commission of oyer and terminer. With respect to such a verdict one case only has been found, namely *The Case of a Juryman*, reported in 12 East, 231, where *Joseph Currie* answered to the name of *Robert Currie* on the panel, and the conviction was affirmed by twelve Judges unanimously, the summons having been served on *Joseph Currie*, and the bailiff intending that he should serve. This unanimous opinion of the whole body of Judges is decisive against the principle relied on for the prisoner, viz. that the variance between the name of the person called and the name of the person sworn may have misled him in his challenge. For inquiries about *Joseph Currie* would be as irrelevant to challenging *Robert Currie* as inquiries about *Thorne* would be irrelevant to *Thorniley*; but the variance was decided to be neither ground of error nor of summary application, and Lord *Ellenborough*, afterwards citing the case, forcibly points out the mischief if such a variance was held to vitiate a verdict. If the present case is to be decided, without reference to authority, by recourse to the principles of justice, the allegation that a party may have been misled in his challenge is insufficient for setting aside a

verdict returned by twelve qualified men sworn in the presence of the parties, and open to any peremptory challenge *super visum*; and if a ground of error is to be created by alleging error in fact, the allegation ought to go further, and show that the party complaining had sustained some actual prejudice from the mistake. For suppose the parties reversed; if the mistake is ground of error for the prisoner so is it also for the prosecutor; and if the prosecutor claimed a new trial on the ground of such a mistake, all would agree that he ought not to succeed unless he could allege actual prejudice. The possible hardship of having lost a challenge from ignorance is no ground for vitiating a verdict, as was said in *Regina v. Sutton (a)*, where an alien was sworn on the jury without the knowledge of the defendant, and a new trial was refused. Thus far I have considered the question as if the Court was, in the present state of the record, legally qualified to decide whether a *venire de novo* should be granted. But that writ is not lawful without an entry on the record showing a valid ground for issuing it; see *Corner v. Shew (b)*. If in this case it issued without legal ground appearing on the record the new trial would be erroneous, and the verdict thereon no ground for judgment; it is therefore necessary to consider what entry could be made, whether casual information to the Judge of the mistake gave him legal knowledge of the fact, so as to authorize him to direct the officer to enter it on the record after the verdict has been recorded and the jury has been discharged. The entry must be according to the supposed fact, and ought to be traversable, so that the truth should be legally ascertained. That entry is essential for a judgment in error, and I cannot assent to the notion that every judicial officer who

1858.

MELLOR'S
Case.

(a) 8 B. & C. 417.

(b) 4 M. & W. 163.

1858. tries an indictment may receive a rumour, and, if he believes it, make an entry accordingly to vitiate a record otherwise correct, and so bind other parties and Courts by an assumption which may be disputed. Thus, in point of substance, there is no ground of error, and in point of form no ground of error appears on this record. Further, the statute creating this Court gives no jurisdiction over a ground of error—certainly not over a mistrial—where a verdict is to be set aside and a *venire de novo* awarded. The provisions of 11 & 12 *Vict.* c. 78. are in terms confined to judgments *after conviction*; there is no authority given to alter the verdict in any way, none to treat a verdict as a nullity and to grant a new trial. The authority is express to vary the judgment in any way, and even to enter an adjudication that the prisoner ought not to have been convicted, but the verdict is to be left to stand notwithstanding such entry. It is true there is a general power to make such order as justice may require, but this general power follows after specific powers relating to judgments only, and the general words are to be restricted by the preceding words, and construed to be *ejusdem generis*. It is also to be noted that, by section 5, the jurisdiction of Courts of error is expressly preserved in respect of errors appearing on the record, and it is therefore probable that cognizance of grounds of error was not intended to be conferred on the Court which was substituted for the meetings of the Judges in former times, in which meetings grounds of error were not considered. For these reasons I am of opinion that the appeal should be dismissed.

WILLIAMS J.—I am of opinion that no *venire de novo* ought to be awarded in this case, because I think it does not fall within the statute 11 & 12 *Vict.* c. 78., under which we are here met. I am of opinion

MELLOR'S
Case.

that the point which has been raised for our consideration is not "a question of law which arose on the trial" within the meaning of the Act. It appears to me that it must be treated as occurring after verdict. If the alleged mistrial could have been cured by verdict, it would have been helped by the verdict which has been given. I do not mean to say that I think it has been so helped in this case. I only mention this to show that the point, as it stands before us, must be regarded as a point occurring after verdict. If that be so it seems to me to follow that it is not "a question of law which has arisen on the trial" within the meaning of the first section of the statute. The questions contemplated by the Act are questions which the Judge before whom the case is tried may reserve in his discretion ; but he cannot reserve a point which he could not have decided finally even if he had been so minded. Now, in the present case, if the point had been one, which could have formed a ground for arresting the judgment, the presiding Judge might have decided it. For I do not mean to say that such a point may not be regarded as "arising at the trial" within the meaning of the statute. But a point like the present could not be raised in arrest of judgment. It could only, in the ordinary course of law, be made the subject of a writ of error in fact ; and I am of opinion that it was not intended by the statute to substitute this Court for a Court of error as to errors in fact. I do not see anything in the statute that enables the presiding Judge to collect the materials for such a tribunal. It is said that the point was brought to the attention of the Judge while he was still acting under the commission in the Assize town ; but I am at a loss to know what power his commission gave him to act in the matter. I think he might just as well have acted after as during the Assizes. There

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

is no doubt that if his object were only to recommend the prisoner to the Crown for a pardon, on the ground that he had not been fairly tried, the Judge might collect information for the purpose at any time, and from any source on which he thought it right to rely. But when the object is not to procure a pardon, but to ascertain whether a *venire de novo* ought to be awarded on the ground that there was error in fact constituting a mistrial, I can see no function which the presiding Judge, at or after the Assize, has to perform in the matter, or which it was meant by the statute to transfer from him to this Court in any event. It may, perhaps, as some are disposed to think, be expedient to alter the common law course of proceeding for obtaining a *venire de novo* in criminal cases, and to deprive the *Attorney General* of his discretion whether he will allow a writ of error, and to deprive the Crown of the right of controverting the facts which are assigned as error; but I am of opinion that, in order to effect such an extensive alteration in the law, it requires much more direct and explicit words than are to be found in this statute.

The opinion I have thus expressed makes it unnecessary for me to consider the question whether, if the facts stated for our consideration by my brother WIGHTMAN had appeared on the record on a writ of error, there ought to be a *venire de novo*. It would be unbecoming in me, aware as I am of the conflicting opinions of my brother Judges, to treat this question otherwise than as a very doubtful one. I will only observe that if the facts stated for our consideration had been assigned as error in the ordinary course, the question might have assumed a very different aspect if the Crown had pleaded, in answer to them (as perhaps it might), that the juryman, *William Thorniley*, was personally well known to the prisoner, and was

seen by him to go to the book to be sworn, and that he never had any intention or wish to challenge that man.

1858.
MELLOR'S
Case.

For these reasons I am of opinion that a *venire de novo* ought not to issue, and that this Court ought to make no other order than that the conviction do stand.

MARTIN B.—I am of opinion that there was a mistrial in this case. I think the prisoner is entitled to have the names of the jury who try him correctly called in open Court, in order that he may know the name of every one by whom he is tried, and in my judgment without this privilege the challenging of jurors would be an idle ceremony. The reason which is urged for not giving to the prisoner this right is, that he is supposed to know the persons of the jurors who are called upon the trial. In point of fact he has no such knowledge, and it seems to me that to assume that the prisoner knows the persons of all the jurors on the panel, or all the persons who are returned to serve as jurymen in the county, would be a fiction worse than any I am aware of. I am therefore of opinion, that there was an essential defect in the trial of this man by reason of his being tried by a jurymen whose name was miscalled; and whom, therefore, in my judgment, he had not the opportunity of challenging which he ought to have had. I have heard another reason urged for depriving the prisoner of what I conceive to be his right, that it may lead to inconvenience by reason either of collusion or of persons getting into the box to try prisoners in the same manner as the jurymen did in the present instance. But to my mind we ought not to found our judgment on possible carelessness and negligence of officers or Judges, or to give any protection of that kind. All Judges ought to be careful to enforce on

1858.

MELLOR'S
Case.

the officers of the Court to take care that the jurymen who go into the box are the persons actually named and called. It would be a mere waste of time to discuss the cases which have been so fully gone into already by my Lord Chief Justice, and in my judgment and opinion there was a mistrial in this case. Well, that being so, the next question to be considered is, how is this to be taken advantage of, and I apprehend it would be entirely an error, and the error was to my mind an error in point of fact. Before the Act of Parliament it might have been competent for the prisoner to assign error in fact on a writ of error, and it still is so. But I am of opinion that he is also entitled to have it put upon the statement of the case made by the learned Judge who tried him; and unless we consider the statement of the Judge as absolute verity, we shall get into confusion in the administration of this Act of Parliament, and I do not know where it is to stop. The Judge is the person to state the case, and we ought to take his statement precisely as a record and act on it in the same manner as on a record of Court, which of itself implies an absolute verity. I have always understood that this Act of Parliament was passed for the purpose of amending one of the greatest scandals that existed in the law, viz., that whilst in civil cases the most minute possible mistake, or the omission of the most paltry piece of evidence, or the rejection of any immaterial matter, would entitle the parties as of right to a new trial, in matters where a person's life depended, as in this case, he was prevented without adopting a most circuitous and difficult course from getting his case reviewed upon any error of fact. I entirely concur with my Lord Chief Justice of the Common Pleas and my Brother COLERIDGE, who think that we ought to give a most liberal construction to

the Act of Parliament, and, instead of limiting it, to extend it as far as we possibly can, for the purpose of giving a prisoner the opportunity of asserting every right which the law confers on him. Now this Act of Parliament gives an express power to us to arrest judgments, that is to decide upon the record as it stands, in fact to decide that there is error, for the arresting the judgment could not be awarded except for error. I am not aware that a judgment can be arrested for any thing that would not also be error; and we have that precise power given to us by the Act of Parliament. Therefore, it seems to me that, having that power, the best way we can exercise it is to make such order as justice may require in every case where, upon the facts sent to us by the Judge, which, as I have said already, I consider to imply absolute verity, there has been any mistrial or any error on the trial. I am not satisfied that the proper mode of proceeding would be to order a *venire de novo*; and my impression is, that the proper mode would be to direct that there be entered upon the record the case stated by the Judge; and to also enter, not a *venire de novo*, but an order of this Court, that a trial should take place in consequence of the previous one being a nullity. It is only a variation in words—it comes to the same thing. But my impression is that, if it becomes necessary to make an entry upon the record in this case, it should be a simple order that the man should be tried again, and we might make a mistake if we directed a thing to be done which seems to me much more within the authority of a Court of error, acting as a Court of record; and, in my judgment, the authority given to us by the Act of Parliament ought to be carried out in the plainest, simplest and most direct form we can, and without reference to any of the old entries that

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

occurred in error. I think that in this case there was a mistrial, and that our order should be in accordance with the opinion I have expressed—that the man shall be tried again. I concur with my brother COLERIDGE, I do not see how this decision at all defeats justice, in fact, in my judgment, it promotes it, and gives to the prisoner that right which the law has distinctly conferred upon him.

CROMPTON J.—I am not satisfied that there is any ground in point of law upon which we ought to interfere with this conviction. The present seems to me one of those cases where an irregularity has occurred in the course of the proceedings which does not necessarily vacate the verdict, but where the Courts in which the record is, in a civil action, or the Crown, in the exercise of its prerogative, may interfere if any unfairness or real prejudice has occurred, but where such interference is only matter of discretion. The person who served on the trial was a qualified person returned by the sheriffs to try the prisoner, and the objection was that another person of a somewhat similar name, also returned by the sheriff, was called, and that the name of the juryman who served was not called, but he stepped into the box and was sworn on the supposition that he was the other person, and in his name. He was, however, presented personally to the prisoner and offered for his challenge, and was sworn without challenge or objection. The argument for the prisoner is that he may have been prejudiced by supposing, from the fact of the name of the other person having been called, that the juryman he had the opportunity of challenging was the party whose name was really called, and so that he may have lost the opportunity of challenging the juryman whom he would have wished to challenge. I think the case the same in principle as that of *The Juryman* in the

note to *Hill v. Yates*. It is true that in that case the juryman in the box was the only one who had been summoned, and the person to whose name he answered was not on the panel, but he was called by the name of another existing person who had lived in the neighbourhood, and whom the prisoner might well have supposed to be the person offered for his challenge; and exactly the same objection made here would have been applicable in that case. The objection is that the prisoner might be misled or deceived by the name of another party to whom he has no objection being called, whilst he might have an objection to and might have challenged the juryman, if he had heard him called by his right name. If the case is not precisely one of misnomer, the alleged prejudice to the prisoner seems to me precisely the same. I am not aware of any authority or case in which the fact that a prisoner has been ignorant of some matter which might have caused him to challenge a person who comes to the box to be sworn, has been held to vitiate a verdict in point of law; and I apprehend that it would not do so even if it appeared that the prisoner had been purposely misled, though it would be matter for the consideration of a Court in a civil case, in exercising their discretion as to granting a new trial under all the circumstances of the case, or for the advisers of the Crown in the exercise of the prerogative of mercy. The Judge or Court at the trial, through their officers, must take care, as far as possible, that the due course of proceedings is properly observed; but it would be most mischievous if every irregularity of this nature, however happening, and even if contrived by, or assented to by, the prisoner or his friends, would necessarily vacate a verdict. If it would necessarily have that

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

effect, the same principle would apply to the case of an acquittal, even though the irregularity were caused by the prosecution. The principle of inconvenience must not, however, be carried too far, as there are cases not very dissimilar to which it would apply and in which there is authority that the proceedings would be erroneous, as, for instance, the case mentioned in 2 *Hale P. C.* 296, where it appeared upon the record that, by mistake, eleven only of the jurymen had been sworn ; but the extreme mischief should make us cautious in seeing that the strict rules of law are not extended in such a manner that at every assizes and sessions we should be in danger of hearing of verdicts being set aside by accidental or contrived irregularities like these in question. I am not aware that any case has carried the doctrine so far as would be necessary to support the objection in question, and in no criminal cases has any similar objection prevailed, that I am aware of ; the case of *Rex v. Tremearne* (a) being the case of a party not qualified to act as a jurymen and not on the panel, and being a case where the Court of Queen's Bench, in which the record was, were exercising their discretionary power of granting a new trial. But even supposing the objection in some shape to be well founded, and considering the doubts entertained by so many of the Judges, and the authorities they think applicable to the case, I am far from speaking of the present as a case not admitting of doubt, still I do not see that we are in a position to act upon it in the manner suggested. It is proposed, as I understand, to reverse the judgment and award a *venire de novo*. We are not now sitting as one of the superior Courts in banc, discussing whether, in the exercise of our discretion, we ought, on affidavit satisfying us of the facts, under

(a) 5 B. & C. 254.

all the circumstances to grant a new trial, as in that class of cases where questions of this kind have generally occurred, and which I do not think applicable to the question before this Court; neither is the case one of the class of cases where there is a variance in the record, as in the instance of there being one name in the *venire* and another in the *distringas* in the jury process in a civil action, to cure which, in some cases, the Statute of Jeofails of *Hen.* 8 contained some provisions not applicable to criminal proceedings; nor have we the record before us showing any mistake as to the calling or swearing the jurymen. The books are full of authority to show that no *venire de novo* can issue except on matter appearing on the record sufficient to justify such award, and if it be improperly awarded, it is error. Very serious difficulties might arise if there should be a second conviction; and if, on error brought, the prisoner should say that the reversal by this Court might be right, as perhaps founded on the evidence, not showing that the legal offence charged was committed, but that there was nothing on the record to warrant the award of the *venire*. This Court has certainly never yet awarded a new trial, even in cases where the justice of the case would be best met by a new trial. Even in the cases in the old books, where the Courts have allowed matter arising after the swearing and before the giving of the verdict as to the misconduct of the jury to be suggested, they require it to be upon the record before they will act upon it. In *Hillord v. Hall* (a), "All the justices say that they ought first to see that a record be made of this, for the matter to appear upon the record for which the judgment shall be stayed; *et si nous agardomos ore un novell venire quant nul tiel matter ne reason appiert sur le record, le posterity*

1858.

MELLOR'S
Case.

(a) 2 Roll. Reports, 261.

1858. *voile admirer al nous*; and because no record is yet
MELLOR'S made of this, but only the notes of the clerk, it was
Case. adjourned until it was put upon the record." In the
case of a challenge being overruled improperly, it is
quite clear that it must appear upon the record before
the overruling can be treated as error; and I apprehend
that it must either be recorded during the trial, or some
minute made of it from which a record can be subsequently
made to justify the officer. I will not undertake to say how
far any such objection as the present could properly be
put upon the record if a writ of error were brought, and the
judgment and proceeding had to be formally entered on the
record. In many cases where the objection, if made, might
have been amended at the time by an alteration or amendment
of a name in the panel or minute, it might be very doubtful
whether the minute of the clerk, from which I presume the
record should be made up, ought to be departed from; and
if the matter be inconsistent with the record, it could not be
assigned for error, as where, in a passage before referred
to from *Hale's P. C.* 296, it appears that, if a juryman be
returned as sworn, it cannot be assigned for error that he
was unsworn. This might possibly be obviated by some
direction that the matter might be stated on the record
according to the fact and truth, or it might be thought
that the fact was not inconsistent with the allegations on
the record; but however that might be with regard to a
Court examining alleged matters of error on the record,
I think that the course we are asked to take would lead
to great danger and mischief. Even in cases like those
mentioned in 2 *Hale's P. C.* 307, 308, where matter of
the misconduct of the jury is allowed to be suggested
upon the record, there seems to have been some examination,
probably upon oath; but here we

should be proceeding on the alleged fresh discovery of facts after judgment, without anything on the record to justify us. If we act without having the record before us in such cases, every Court of Quarter Sessions or Assize may, on mere rumour, supposition or surmise, without evidence, affidavit or personal knowledge of the Judge or presiding officer, certify to us that matter not appearing on the record has come to their knowledge, and ask us on that to award a *venire de novo*, and probably might themselves, on the same ground, award a new *venire*. In the case of a writ of error, and error in fact being assigned, the Crown, in the case of a conviction, or the prisoner, in the case of an acquittal, would have the right of traversing the matter alleged, and so questioning its truth. I feel great difficulty in seeing how we can act without there being some such opportunity afforded to the parties, or at all events without the matter being on the record. These considerations make me concur with those Judges who think that we cannot reverse this judgment, or order a fresh *venire* or new trial, by virtue of the 11 & 12 Vict. c. 78.; and, upon the whole, I am of opinion that we ought not to interfere with this conviction.

1858.

MELLOR'S
Case.

CROWDER J. — I entertain considerable doubt whether this case falls within the statute, and the inclination of my opinion is that it does not; but, assuming it to do so, I am of opinion that there has been no mistrial, and that the conviction is right. The single fact raising the point of law in this case is, that, when the name of *Joseph Henry Thorne* was called from the panel of the petty jurors, *William Thorniley*, in the same panel, answered by mistake, and was sworn as one of the twelve jurymen who ultimately found the prisoner guilty of murder. The mistake was not mentioned to the learned Judge till

1858. the day after the termination of the trial, and the
MELLOR'S question for us to decide is, whether such mistake has
Case. rendered the trial abortive. The prisoner has been
tried by twelve men legally qualified to serve as jurors,
and whose names had been duly recorded in the panel
of petty jurors. There has been no default or neglect
in the officer of the Court, whose duty it was to
impanel the jury, and there is no suggestion that the
prisoner has suffered the slightest prejudice, in fact,
from *William Thorniley* having served on the jury
instead of *Joseph Henry Thorne*. It is further stated
by the learned Judge as a fact, that the prisoner was
offered his challenge before *William Thorniley* was
sworn ; and it is quite consistent with the statement
in the case that the prisoner may have had a personal
knowledge of *William Thorniley* as the individual,
about to be sworn, but had no design to challenge
him. Before I can arrive at the conclusion that a
verdict found by such a jury so impanelled is a
nullity, I must be satisfied that there exists some
stringent and inflexible rule of law which goes the
length of avoiding every criminal trial when such a
mistake (however unattended with the slightest mis-
chief) has occurred. It is in the experience of every
one familiar with Criminal Courts that, notwith-
standing the greatest caution and circumspection on
the part of the officer, such mistakes will occasionally
occur, either from the defective pronunciation of
strange names, or from the inattention and want of
accurate hearing of the jurors whose names are called
over ; and, if there be any rule of law which renders
such a mistake *per se* fatal to the verdict, I own I
should contemplate, with the utmost alarm, the awful
consequences which might ensue from it to the
administration of criminal justice throughout the
country. Verdicts found at the Assizes and Quarter

Sessions after the most patient and careful investigation, where the trials have been conducted with the utmost impartiality, and the results have been most satisfactory to the ends of justice, might be set aside, and the prisoners, if convicted, might have another chance of escape, or, if acquitted, might have their lives and liberty again imperilled by another trial. For if such a mistake be fatal to the trial, it is equally so whether the verdict pass for or against the prisoner, and whatever the nature of the crime may be with which he is charged. But I can find no such rule of law. One or two of the earlier cases of civil actions were relied on, where a similar irregularity was held to constitute a mistrial. But those authorities were fully discussed and considered in the later cases of *Hill v. Yates* (a), and *Rex v. Hunt* (b), and *Earl of Falmouth v. Roberts* (c), where it was clearly settled that such irregularity did not of itself vacate the trial, but that in any such case it was in the discretion of the Court whether a new trial should be granted. *Rex v. Tremearne* seems to have but little bearing on this case, as there an infant had been sworn by mistake upon the jury, and Lord *Tenterden* and the Court of King's Bench decided that there was a mistrial, because the infant was not qualified to sit upon any jury, and so the verdict was not returned by twelve good and lawful men. The "*Case of a Jurymen*" in the notes to *Hill v. Yates* (a), is not in point as to the facts; because there the only name on the panel of petty jurors was *Joseph Curry*, which was really intended for *Robert Curry*, who had been duly summoned to attend. There was a *Joseph Curry* in existence, but who was not qualified to be on the

1858.

MELLOR'S
Case.

(a) 12 East, 229.

(b) 4 B. & Ald. 430.

(c) 9 Mee. & Wels. 469.

1858. panel. The name *Joseph Curry* being called, *Robert Curry*, the man really interested, went into the jury box and was sworn, and served. It was contended that there was a mistrial, but held by all the Judges that there was not, but only a misnomer, which did not invalidate the trial. As regards the main ground, however, on which it was contended before us that there had been a mistrial, *The Case of a Juryman* is directly in point. It is said that *Mellor's* right to challenge was presumedly prejudiced, because he *may* have desired to challenge the name of *William Thorniley*, though not the name of *Joseph Thorne*, and may have known neither of them personally; and so, in *The Case of a Juryman*, the prisoner might have had cause of challenge against *Robert Curry*, but none against *Joseph Curry*; and thus the prisoner might have had his right of challenge curtailed if he knew neither of the men personally. The trial, however, was held valid by all the Judges. I am of opinion therefore that there has been no mistrial in the present case, and that the conviction must stand.

WILLES J.—I am not satisfied that there was a mistrial.

The prisoner was tried by twelve men taken from the panel and sworn in his presence without challenge or objection, and without any default in the Court or its officers.

If a foreigner had been upon the jury unknown to the prisoner the conviction would have been unobjectionable, even though the prisoner were proved to dislike foreigners and to be sure to have challenged one if known by him to be so.

Again, if the juryman had been described on the panel by a wrong Christian name, and had been called thereby in Court and sworn upon the jury, the con-

viction would have been valid. Yet such a mistake might, equally with that in question, have misled the prisoner and prevented him from challenging.

I cannot distinguish the present case from *Hill v. Yates* (a) and *The Case of a Juryman* (b), and I think the decisions in those cases are correct in principle.

Care ought to be taken at the time that the jury may be composed of persons whom neither the Crown nor the prisoner can justly object to.

On the other hand, lest the proceedings should be interminable, the Crown and the prisoner ought to take their objections in proper time, as each juryman comes to the book to be sworn and before he is sworn.

If this was a mistrial, the prisoner being convicted, it would equally have been a mistrial in case of acquittal; but to order a *venire de novo* in the latter case would be scandalous and oppressive.

It is not suggested that the prisoner has not had a fair trial, nor that he has sustained any prejudice.

Far from its appearing that he was deprived of his challenge, it is even consistent with the facts that he may have known who was about to be sworn, and advisedly abstained from objecting to him.

In the cases relied upon for the prisoner, those who served as jurymen were not upon the panel or returned to serve; and those cases are in other respects, already stated by my brother *Erle*, distinguishable from the present. I am not disposed unnecessarily to add to their number.

As to any supposed tenderness and humanity to the prisoner in giving way to such an objection, I have no right to be tender and humane at the expence of the law.

If it appeared that the prisoner had not a fair trial

(a) 12 East, 229.

(b) In note to *Hill v. Yates*, *ibid.* 230; S. C. in Black Book, vol. 1.

1858.

MELLOR'S
Case.

1858. he would of course be pardoned; but there is no pretext for that.

MELLOR'S
Case.

In this view of the case, it may be unnecessary to express an opinion upon the construction of the statute 11 & 12 *Vict.* c. 78.; but upon that point I concur in the judgment of the Lord Chief Baron.

I am of opinion that the conviction is right and ought to stand.

WATSON B.—I am of opinion that in this case there has been a mistrial; that this Court is competent to award a *venire de novo*, and that accordingly a *venire de novo* ought to be awarded. I have arrived at this conclusion after much consideration, and not without some doubt. I do not feel myself called upon after the ample discussion that has taken place, to give my reasons at length; it is sufficient to say that I concur in the judgment delivered by the Lord Chief Justice of the Queen's Bench.

CHANNELL B.—I certainly entertained very considerable doubts in the course of the argument, and, after the observations of the Chief Justice of the Common Pleas, and the difference that now prevails on the bench upon the subject, it is with some hesitation that, upon the best consideration I have been able to give to the subject, I have come to the conclusion that there has been no mistrial in this case. I concur in the judgment of my brother ERLE, and the reasons he has given for it. In the first place, I am unable to distinguish this from *The Case of a Juryman*. I agree with my brother CROWDER that the facts are not precisely the same, but the law that was laid down by Lord *Ellenborough* in that case, in my judgment, strictly applies to the present inquiry. I do not concur in one observation that fell from my Lord Chief Justice, namely, that the fact that there was no deliberate argument in the case of *Hill v. Yates* detracts from

its authority. *The Case of a Juryman*, on which it was founded, did receive the deliberate consideration of the Judges. It was considered by the twelve Judges; the point was at first overruled by EYRE B., but, in consequence of the opinion of counsel, the matter was brought under the consideration of the twelve Judges, and seeing that there was in that case a capital offence, forgery being then attended with liability to capital punishment, it must have received full consideration. In the case of *Hill v. Yates*, in which the Court refused a rule for a new trial, the matter was argued on the motion for a new trial by a very learned counsel, who applied all the consideration he could to induce the Court to grant a rule for a new trial. The language of Lord *Ellenborough* is: "If upon consideration and consultation with the other Judges they find themselves bound to grant it, they would of their own accord award the rule prayed for." It appears that the matter was well considered by the Judges. I find then, in 1810, *The Case of a Juryman* was determined by twelve Judges, and a different set of Judges twenty-seven years afterwards, on full consideration, say, we uphold the doctrine in *The Case of a Juryman*. I am unable to distinguish that case from the present. But even supposing there has been an irregularity or a mistrial, it seems to me, on the best consideration I can give the matter, that it would only be ground of error. I am of opinion that the 11 & 12 *Vict. c. 78.* does not authorize this Court to do what we must do if the argument in favour of the prisoner is to prevail. In the first place the Court is called on, with respect to matters of law, to hear and finally determine; in the next place, authority is given to the Court to reverse, affirm, or amend any judgment. It may reverse a judgment in this way: if the

1858.

MELLOR'S
Case.

1858.
MELLOR'S
Case.

learned Judge at the trial reserved the question whether or not evidence was properly received, and the Court is of opinion that the evidence was not properly received, and the prisoner has been convicted after the receipt of such evidence, the Court may reverse the judgment. Further, the Court may affirm the judgment; that is, treat it as correct; or amend any judgment, which I understand to apply to a case where there has been a conviction proper in its character, but followed by a wrong sentence, as, for instance, a sentence of imprisonment for a longer term than the law authorizes in such a case. Then, on reversing the judgment, it is a nullity: affirming it, it is to stand, or amending it, it is to stand in its amended state. Again, we may avoid the judgment, that is, vacate it, in a case where there ought to have been no conviction at all; and we have power to "order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment." I pause there. My brother MARTIN has said, you can only arrest the judgment for a matter that would be ground of error. Now, my view of the statute is this, that some matters are taken away which might have been ground of error before. Whatever the Court does, it is to do finally, and it is therefore empowered to arrest the judgment. But then the word demurrer is not found in the statute, and that may perhaps warrant the decision of PARKE B., that in cases of demurrer this Court has no jurisdiction. The words "such order as justice may require" I think must be read as words *ejusdem generis*, and apply to a case where judgment is reversed, affirmed, amended, or only avoided, and nothing more is to be done. I think, when we come to look at the certificate that is to be given, we shall find

that such is the true meaning of the statute. The statute enacts, that "a certificate of such entry under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this Act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be." Now, I do not attach much importance to the provision for an alteration in the form given by the statute to meet the circumstances of the particular case; but, in construing the statute, I cannot throw the form out of consideration. Then the statute says, that such certificate having been given, it is to be delivered or transmitted by the clerk to the sheriff or gaoler in whose custody the person convicted shall be, and that "the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons, for the execution of the judgment as the same shall be so certified to have been affirmed or amended;" if the judgment is affirmed it is to be executed: if it is amended it is to be executed according to its amended form and character. "And for the discharge of the person convicted from further imprisonment if judgment shall be reversed, avoided, or arrested." I find here the word "avoided" is actually introduced in the clause. It seems to me on these grounds that the present case is not within the statute, and I do not found my judgment upon the time at which the discovery of the mistake was made. I think it may be that, although the discovery was made after the trial, it would not prevent the case being within the statute if in other respects it would embrace it. My opinion is that this statute does not apply to a case of this

1858.

MELLOR'S
Case.

1858.

MELLOR'S
Case.

kind in which our decision cannot be final, either in avoiding, affirming, or amending the judgment. I am of opinion there has been no irregularity, and, if there has, it can only be redressed by writ of error, and this Court has no jurisdiction under the statute to decide the matter.

BYLES J.—*Joseph Henry Thorne* and *William Thorniley* are both upon the panel. *Thorne* is called and by mistake *Thorniley* answers, is sworn and tries the case. No prejudice appears to have been suffered by the prisoner, but it is suggested that in such a case a prejudice might possibly happen. I am of opinion that there has been no mistrial. The mistake is not a mistake of the man, but only of his name. The very man who, having been duly summoned, and being duly qualified, looked upon the prisoner, and was corporeally presented and shown to the prisoner for challenge, was sworn and acted as juryman. At bottom the objection is but this, that the officer of the Court, the juryman being present, called and addressed him by a wrong name. Now it is an old and rational maxim of law that where the party to a transaction, or the subject of a transaction, are either of them actually and corporeally present, the calling of either by a wrong name is immaterial. *Præsentia corporis tollit errorem nominis*. Lord *Bacon*, in his maxims (Regulæ 25), fully explains and copiously illustrates this rule of law and good sense, and shows how it applies, not only to persons but to things. In this case, as soon as the prisoner omitted the challenge, and thereby in effect said, I do not object to the juryman there standing, there arose a compact between the Crown and the prisoner that the individual juryman there standing corporeally present should try the case. It matters not, therefore, that some of the accidents

of that individual, such as his name, his address, his occupation, should have been mistaken. *Constat de corpore*, and that is enough, at least where the juryman is duly qualified and summoned. Suppose the name by which the juryman is now called not to be the name of himself or of anyone else, that amounts but to this, that he is so called by that name improperly. Suppose the wrong name to be a name by which another or others are called, can it make any difference in principle? Suppose a bearer of that name is to be found, not only in *England*, but in the county, or on the panel. In all these cases there is a possibility, and various degrees of probability, of prejudice, or perhaps more properly speaking, of improbability, but a mere possibility of prejudice cannot vitiate the trial; for, if so, a wrong addition, or any other misdescription of the juryman, when called into the box, would be a fatal objection to the trial. The case in the note to *Hill v. Yates* (a) seems to me to confirm this view, and to be a solemn decision by all the Judges of *England* seventy-five years ago, that, notwithstanding some earlier cases, a mistake of this nature is no mistrial. If another rule is once introduced new trials in criminal cases will come in like a flood. It is in vain to say that greater care should be used. Wise and practical regulations must contemplate and provide for the occasional oversight and inadvertences which by the law of chances are certain to happen among the thousands of criminal trials before all sorts of jurisdictions every year in *England*. Moreover, if a mistake of this nature vitiate a verdict against a prisoner, it equally vitiates a verdict for him. The Crown may at any time, and at any distance of time,

1858.

MELLOR'S
Case.

(a) 12 East, 229.

1858. take a similar objection, and the validity of all
MELLOR's acquittals, past and future, is put in jeopardy. I also
Case. entertain considerable doubt whether the statute
authorizes this Court to grant a *venire de novo*.

Lord CAMPBELL C. J.—There being eight Judges
in favour of affirming the conviction and six of
a contrary opinion; the conviction is therefore
affirmed.

Judgment affirmed.

REGINA v. BENITO LOPEZ.

REGINA v. CHRISTIAN SATTLER.

1858.

These cases, though separately reserved, are reported together, because similar matters of law arose in both cases, and one judgment only was delivered by the Court.

An *English* ship on the high seas is part of the territory of *England*; and a foreigner on board such ship is subject to our laws, and therefore, if he there does an act which is a criminal offence by the law of *England*, he is amenable to that law, and may, by virtue of section 21 of the 18 & 19 *Vict. c. 91.*, be tried for the offence before any Court of justice in the Queen's dominions

REGINA v. LOPEZ.

ON the trial of *Benito Lopez* the following case was reserved and stated by CROMPTON J.

The prisoner was tried before me at the Summer Assizes, 1857, at *Exeter*, on an indictment charging him with feloniously wounding *George Smith*, with intent to do him some grievous bodily harm, and was found guilty of unlawfully wounding, and sentenced to two years imprisonment with hard labour.

It was proved at the trial that the prisoner, a foreigner, being a sailor and one of the crew of the *British* ship *Ontario*, maliciously and unlawfully wounded the prosecutor, also a foreigner and a sailor,

having cognizance of such crimes if committed within its limits, within whose jurisdiction he may be brought; for when so brought he is, within the meaning of that section, "found" within such jurisdiction.

Neither the liability of a foreigner to punishment for an offence committed by him in an *English* ship on the high seas, nor the jurisdiction of the Courts of this country to try him for such offence, is affected by the fact that he was illegally and by force taken on board the ship and there illegally detained at the time of the commission of the offence, unless the act charged was committed for the purpose of releasing himself from illegal duress; and, therefore, where a foreigner, who was arrested in a foreign town and forced on board an *English* ship, while kept in custody in such ship on the high seas, killed the officer who arrested him out of *malice prepense* and not with a view to escape, it was held that, even assuming such arrest and detention to be illegal, he was guilty of murder, and was properly tried for such offence at the Central Criminal Court within whose jurisdiction he was brought.

1858.

LOPEZ'S
Case.

and one of the crew of the same ship, whilst on the high seas and in the said ship on a voyage from *London* to the coast of *Africa*.

I reserved for the consideration of the Court the question, whether the prisoner, a foreigner, was properly convicted of the offence committed on the high seas.

CHARLES CROMPTON.

This case was argued on 23d *January*, 1858, before Lord CAMPBELL C. J., COCKBURN C. J., POLLOCK C. B., COLERIDGE J., WIGHTMAN J., ERLE J., WILLIAMS J., MARTIN B., CROMPTON J., CROWDER J., WILLES J., WATSON, B., CHANNELL B. and BYLES B.

Welsby (with him *M. Bere*) appeared for the Crown.

Ballantine Serjt. (instructed by the Solicitor to the Treasury) appeared for the prisoner.

Ballantine Serjt., for the prisoner. This case is one of great importance, involving serious questions of international law. I propose to consider first, the operation of the statute 18 & 19 *Vict.* c. 91. s. 21., and then the more general question as to the liability of a foreigner to the operation of our laws.

The question which arises upon the statute is whether, under the circumstances of this case, the prisoner was "found" within the jurisdiction of the Court before which he was tried (*a*). I contend that

(*a*) The section enacts, that "if any person, being a *British* subject, charged with having committed any crime or offence on board any *British* ship on the high seas, or in any foreign port or harbour; or if any person, not being a *British* subject, charged with having committed any crime or offence on board any *British* ship on the high seas is *found* within the jurisdiction of any Court of justice in her Ma-

jesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such Court shall have jurisdiction to hear and try the case, as if such crime or offence had been committed within such limits; provided that nothing contained in this section shall be construed to alter or interfere with the Act 12 & 13 *Vict.* c. 96."

he was not so found. The case does not state that the prisoner was found within the jurisdiction.

1858.

 LOPEZ'S
Case.

LORD CAMPBELL C. J.—The prisoner was tried at *Exeter*, and therefore must have been found in the county of *Devon*.

Ballantine Serjt. Then I contend that this enactment was intended to apply to cases where an offender, having escaped, is afterwards discovered within the jurisdiction of some Court competent to try persons for such offence. Here the prisoner was not “found,” but was “brought into” the jurisdiction in custody and against his will. If the statute is construed so as to apply to such a case as this, all particular jurisdictions will be rendered nugatory, and persons can be brought anywhere to be tried at the arbitrary will of those who have them in custody; and an offender escaping from a ship after the commission or alleged commission of a crime therein may, if afterwards arrested in an *English* county, be taken all over *England* to any spot where the government may choose that he shall be tried.

LORD CAMPBELL C. J.—Before this statute, by the statute of 28 *Hen.* 8. c. 15. the Crown had power to grant a special commission to try a prisoner for an offence committed within the Admiralty jurisdiction wherever it pleased, and, if that power was abused, those who abused it were responsible.

MARTIN B.—If the prisoner went voluntarily on board the ship, his case might be very different to what it would be if he was forced on board upon the coast of *Africa*; and I should like to have it stated in the case in what manner he went on board.

CROMPTON J.—He was one of the crew; and we cannot imply that any force was used to bring him on board the ship.

Ballantine Serjt. I think it must be conceded

1858.

LOPEZ'S
Case.

that he went on board the vessel voluntarily ; but he did not go voluntarily and of his own mere motion within the jurisdiction of the Court at *Exeter*. He was “found” in the ship and was “brought” within the jurisdiction of the Court by force. The word “found” must mean found at first, and cannot mean found at one place and brought into another place to be tried. If the Legislature had intended the statute to bear the interpretation now contended for by the Crown, the object would have been easily effected by enacting that the offender may be tried within the jurisdiction of any Court where he *shall be*.

COLERIDGE J.—In the Customs Laws Consolidation Act (*a*), the words are where the offender “may be or may be brought.”

Ballantine Serjt. The words “may be” in that statute are equivalent to the word “found” in this. If the words “or may be brought” were used in this statute they would include the case now before the Court. This is a question of great importance and involving grave considerations, and the Court will hesitate before deciding that the case, where there is a voluntary approach to a jurisdiction and an abandonment of the right to avoid it, is to be placed in the same category as the case where a man is brought in irons to a place for the purpose of being found there.

I next contend that the conviction is bad on the

(*a*) 16 & 17 *Vict. c.* 107. Sect. 275, to which his Lordship alluded, enacts, that “where any offence shall be committed in any place upon the water not being within any county of the United Kingdom, or where the officers have any doubt whether such place is within the boundaries or limits of any such county, such offence shall for the purposes of this Act be deemed and taken to be an offence committed

on the high seas; and for the purpose of giving jurisdiction under this Act every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was committed or arose or in any place on land *where the offender or person complained against may be or be brought.*”

more general ground that the prisoner, a foreigner on board a *British* ship, was not amenable to the municipal law of this country for the offence he there committed. Before the passing of the Admiralty Statutes, giving jurisdiction to try offences, there was no jurisdiction in this country to try a person for an offence committed on the high seas.

COCKBURN C. J.—There is a strong opinion that, but for the difficulty as to laying the venue, a person committing an offence on the high seas in an *English* ship would have been amenable to punishment at the common law.

Ballantine Serjt. Before the 7 & 8 *Vict.* c. 2., treasons, murders, felonies and confederacies committed upon the high seas, within the jurisdiction of the Admiralty (except in the case of prisoners committed to or detained in the gaol of *Newgate*, the trial of whom was regulated by 4 & 5 *Wm.* 4. c. 36. s. 22.), must have been tried in such shire of the realm as should be specially limited for that purpose by a Royal commission issued under section 1 of 28 *Hen.* 8. c. 15. By the 39 *Geo.* 3. c. 37. *all* offences committed on the high seas may be tried in like manner as treasons, murders, &c., under 28 *Hen.* 8. c. 15. Then comes the statute 7 & 8 *Vict.* c. 2., by which justices of oyer and terminer may try offences committed on the high seas, and other places within the jurisdiction of the Admiralty of *England*; and are to deliver the gaol in every county within the limits of their several commissions of any person committed to or imprisoned therein, for any offence alleged to have been committed on the high seas and other places within the jurisdiction of the Admiralty. In none of these statutes are foreigners expressly named, and I contend that they are not by implication included in them. The only way in which it

1858.

 LOPEZ'S
Case.

1858.

LOPEZ'S
Case.

can be suggested that these statutes bind foreigners committing offences in *English* ships, is that those who come on board an *English* ship thereby become liable to *English* law.

COCKBURN C. J.—In an *American* edition of *Hale's Pleas of the Crown*, it is laid down, that if a foreigner commits an offence on board an *American* vessel that offence is cognizable by the Courts of the *United States*.

Ballantine Serjt. It seems unreasonable to hold that a foreigner, by going on board an *English* ship, even voluntarily, becomes a *British* subject, or that a qualified allegiance is thereby created. If such an allegiance is created, does it extend to crimes against nature only, or also to crimes against municipal law? These are questions which have never been gravely considered by our Courts; and it must be recollected that if a foreigner going on board an *English* ship is to be amenable to *English* law, the converse will obtain, and an *Englishman* going on board a foreign ship must be equally amenable to foreign law. It can make no difference whether the person so going on board is a member of the crew or not; but the principle would apply equally to every person going on board an *English* vessel; so that a foreign woman who gave birth to a child on board an *English* ship would be liable to be punished if she concealed the birth, though such an act might be perfectly innocent by the law of her own country; and an *Englishman*, on board a foreign ship, going from one *English* port to another, might be made amenable to some foreign law of which he was altogether unaware.

LORD CAMPBELL C. J.—For instance, if it was an offence against the law of a foreign country to read the Holy Bible.

COCKBURN C. J.—On the other hand, if the con-

trary doctrine is to hold, murder can be committed by a foreigner on board our ships with impunity.

1858.

 LOPEZ'S
Case.

Ballantine Serjt. Mr. Justice *Story*, in his *Conflict of Laws*, s. 19, citing *Boullenois*, says: "The sovereign has also a right to make laws to govern foreigners in many cases; for example, in relation to property which they possess within the reach of his sovereignty; in relation to the formalities of contracts which they make within his territories; and in relation to judiciary proceedings if they institute suits before his tribunals. The sovereign may, in like manner, make laws for foreigners who even pass through his territories; but these are commonly simple laws of police, made for the preservation of order within his dominions." In the next section (20) he says: "Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural born subjects or others. This is a natural consequence of the first proposition, for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations that any one nation should be at liberty to regulate either persons or things not within its own territory." Then, in section 539, he says: "Considered in an international point of view, jurisdiction, to be rightly exercised, must be founded either upon the person being within the territory or upon the thing being within the territory; for otherwise there can be no sovereignty created, upon the known maxim; *extra territorium jus dicenti impune non paretur*. *Boullenois* puts this rule among his general principles. The laws of a sovereign rightfully extend over persons who are domiciled within his territory, and over property which is there situate (a). *Vattel* lays down the true doctrine in

(a) i *Boullenois*, Pr. Gén. 1, 2, p. 2, 3.

1858.
 LOPEZ'S
 Case.

clear terms : 'The sovereignty,' says he, 'united to domain, establishes the jurisdiction of the nation in its territories, or the country which belongs to it. It is its province or that of its sovereign to exercise justice in all places under its jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country' (a). On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity and incapable of binding such persons or property in any other tribunals" (b). In section 541, he adds : "In regard to foreigners resident in a country, although some jurists deny the right of a nation generally to legislate over them, it would seem clear upon general principles of international law that such a right does exist ; and the extent to which it should be exercised is a matter purely of municipal arrangement and policy. *Huberus* lays down the doctrine in his second axiom : 'All persons who are found within the limits of a government, whether their residence is permanent or temporary, are to be deemed subjects thereof' " (c).

In *Wheaton's Elements of International Law* (d) it is said : "The judicial power of every independent state then extends, with the qualifications mentioned : 1, to the punishment of all offences against the municipal laws of the state by whomsoever committed within the territory. 2, to the punishment of all such offences by whomsoever committed on board its public and private vessels on the high seas, and on board its public vessels in foreign ports. 3, to the punishment of all such offences by its subjects, wheresoever

(a) Vattel, b. 2, ch. 8, s. 84.

(c) Huberus, tom. 2, lib. 1, tit. 3.

(b) *Picquet v. Swan*, 5 Mason R.

35, 42. See *Russell v. Smyth*, 9 Mee. & Welsb. 819.

(d) 1st edit., p. 158 ; 3rd edit., p. 157 ; 4th edit., p. 174.

committed. 4, to the punishment of piracy and other offences against the law of nations by whomsoever and wheresoever committed." The opinion of this commentator would no doubt be against me, but that opinion is at variance with the doctrine laid down in 1 *Kent's Commentaries* (a), where it is said: "No nation has any right of jurisdiction at sea except it be over the persons of its own subjects in its own public or private vessels." No doubt the learned commentator goes on to say: "And so far territorial jurisdiction may be considered as preserved, for the vessels of a nation are in many respects considered as portions of its territory, and persons on board are protected and governed by the law of the country to which the vessel belongs. They may be punished for offences against the municipal laws of the state committed on board its public and private vessels at sea and on board of its public vessels in foreign ports" (b). But I submit that this does not qualify the general proposition which I have referred to, and which I contend is a correct proposition of international law.

1858.

 LOPEZ'S
Case.

COCKBURN C. J.—The meaning of the author is explained in another passage later in the Book (c), where, after referring to two Acts of Congress of 1790 and 1825, and noticing the diversity of the language in different sections, and the consequent want of precision on the subject of the criminal jurisdiction of the Admiralty over crimes committed on the high seas, he says: "We may safely say that so far as any crime committed upon the high seas, no matter by whom or where, amounts to piracy within the purview of the law of nations, there can be no doubt of the jurisdiction of the

(a) 4th edit., p. 26.

13. Rutherf., b. 2, c. 9.

(b) Grotius, b. 2, c. 3, ss. 10 and

(c) 4th edit., p. 363, note a.

1858. *Circuit Courts of the United States.* But where the crime has not attained that bad eminence, then the jurisdiction can only, upon proper principles, attach to crimes committed by *American* citizens upon the high seas, or to crimes committed in or upon an *American vessel on the high seas.* If the *American* citizen commits the crime on the high seas on board of a foreign vessel, the personal jurisdiction over the citizen in that case if it exist at all, must be concurrent with the jurisdiction of the foreign government to which the vessel belongs or by whose subjects it is owned. Under the 8th section of the Act of April 30, 1790, if an offence be committed on board of a foreign vessel by a citizen of the *United States*, or on board of a vessel of the *United States*, by a foreigner, or by a citizen or foreigner on board of a piratical vessel, it is cognizable by the Courts of the *United States.*"

LOPEZ'S
Case.

Ballantine Serjt. There is no doubt a considerable weight of authority in support of the doctrine laid down by *Wheaton*, and supported by the *American* decisions and some decisions in this country to which I will now refer. In *Forbes v. Cochrane* (a), where one of the questions was whether slaves became free as soon as they were on board a *British* vessel, the marginal note appears to be against the view for which I am contending, but upon examination the case does not seem to have any direct bearing upon the one we are now considering. It is true that *Best* J., in the course of his judgment, speaking of escaped foreign slaves, says: "These men when on board an *English* ship had all rights belonging to *Englishmen*, and were subject to all their liabilities. If they had committed any offence they must have been tried according to *English* laws;" and again,

(a) 2 B. & C. 448.

1858.

 LOPEZ'S
Case.

“so far as this question is concerned, there is no difference between an *English* ship and the soil of *England*; for are not those on board an *English* ship as much protected and governed by the *English* laws as if they stood upon *English* land?” This would seem to go to the extent that under a *British* flag every body is a *British* subject; but this dictum was not necessary to the decision of the case, and *Bayley J.*, in his judgment, guards against any such inference being drawn from the opinion expressed by him.

In *Rex v. Depardo* (a) it was held that a manslaughter committed in *China*, by an alien enemy who had been a prisoner of war and was then acting as a mariner on board an *English* merchant ship, on an *Englishman*, could not be tried here by virtue of a commission issued in pursuance of statutes 33 *Hen. 8. c. 23.* and 43 *Geo. 3. c. 113. s. 6.*

COCKBURN C. J.—In *Rex v. Depardo*, three cases are mentioned, in which, if your doctrine be correct, the prisoners were wrongfully convicted. The cases of *Francois Antoine Sauvajot*, *Jean Prevôt* and *Acow* were all of them cases of foreigners tried and convicted in *England* of offences committed on board of *English* ships on the high seas.

Ballantine Serjt. Those cases do not appear to have been well considered, and the whole question is well worthy of now receiving a careful and deliberate consideration.

Welsby (with him *M. Bere*), for the Crown. The jurisdiction of the Court at *Exeter* does not depend upon the 18 & 19 *Vict. c. 91. s. 21.*; for if the prisoner was amenable to *British* law he was triable by that Court by virtue of 28 *Hen. 8. c. 15.* and 7 & 8 *Vict. c. 82.*; but if the case depended wholly upon section 21 of the 18 & 19 *Vict. c. 91.* the word *found*, in that

(a) 1 Taunt. 26.

1858.

 LOPEZ'S
Case.

section, clearly means that a man may be tried at any place where he is at the time of the trial. *Regina v. Smythies* (a) and *Regina v. Whiley* (b) are decisions on analogous statutes, and support the construction for which I contend. Then as to the international question: it is a general principle of international law that a ship, public or private, on the high seas is, for the purposes of jurisdiction over crimes therein committed, a part of the territory of the country to which the ship belongs; and a person coming voluntarily on board an *English* ship is as much amenable to the criminal law of *England* as if he came voluntarily into an *English* county, in which case he would be triable under 28 *Hen.* 8. c. 15. and 7 & 8 *Vict.* c. 2. The same principle governs the law of *America* and *France*, and is to be found in all the great text writers on international law.

In *Vattel* (c), speaking of children born at sea, it is said: "And if the children are born in a vessel belonging to the nation, they may be reputed born in its territories, for it is natural to consider the vessels of a nation as parts of its territory, especially when they sail upon a free sea, since the state retains its jurisdiction over those vessels."

In a note, 1 *Kent's Commentaries*, 4th edit., p. 363, it is said: "Where the crime has not attained that bad eminence (of piracy), then the jurisdiction can only upon proper principle attach to crimes committed by *American* citizens upon the high seas, or to crimes committed in or upon an *American* vessel on the high seas."

In *Fœlix, Traité du Droit International Privé*, s. 544, it is said: "D'autre part tout vaisseau qui navigue en pleine mer, patrimoine commun de toutes

(a) 1 Den C. C. 498.

(b) 2 Moo. C. C. 186.

(c) Book 1, s. 216.

les nations, est considéré comme formant une continuation du territoire de la nation à laquelle ou aux citoyens de laquelle il appartient. Dès lors tribunaux de cette nation sont seuls compétents pour connaître des crimes et délits commis à bord de ces vaisseaux."

1858.

 LOPEZ'S
Case.

In *Ortolan, Règles Internationales et Diplomatie de la Mer*, vol. 1, p. 293, we find: "Les navires, soit de guerre soit de commerce, sont un espace mobile soumis en pleine mer à la souveraineté du pays auquel ils appartiennent et rien qu'à la souveraineté de ce pays." The same writer says of crimes, of the nature of the offence of which the prisoner in this case has been found guilty, that there are "qu'on appelle des crimes ou des délits *communs*, c'est-à-dire des violations de devoirs imposés à tout-le-monde dont chacun peut être victime, et que chacun, par conséquent, a intérêt de voir réprimer: comme les injures, les coups, les blessures, le vol, le meurtre et tous autres délits contre les personnes ou contre les biens" (p. 288). He subsequently treats of the jurisdiction to which those who commit such crimes on board ship are amenable, and says, at p. 293, "Il en est des délits commis à bord en pleine mer comme s'ils avaient été commis sur le territoire de l'état auquel appartient le navire: les auteurs de ces délits sont passibles de la loi pénale et justiciables des juridictions répressives de cet état. Il ne faut pas distinguer si les coupables ou les individus lésés par le délit, sont nationaux ou étrangers."

In 1 *Wheaton's Elements of International Law* (a), it is said, "Both the public and private vessels of every nation on the high seas and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong."

Many authorities on the subject are to be found

1858. in the *American* reports, and they all tend to support
 the view for which I contend.

LOPEZ'S
 Case.

In *The United States v. Palmer and others* (a) Johnson J. lays down the broad principle that "Congress can inflict punishment for offences committed on board vessels of the *United States*, or by citizens of the *United States* anywhere."

In *The United States v. Holmes* (b), Washington J., delivering the judgment of the Supreme Court, says, that "it makes no difference whether the offender be a citizen of the *United States* or not. If it" (the crime) "be committed on board of a foreign vessel by a citizen of the *United States*, or on board of a vessel of the *United States* by a foreigner, the offender is to be considered *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails."

The case of *Rex v. Depardo* (c), and the decisions therein referred to, and the view taken in *Regina v. Serva* (d), are all against the contention now made on behalf of the prisoner.

Ballantine Serjt., in reply. I was quite aware of the strength of the *American* cases, but the question is what weight you give to those decisions, and whether you think they are in accordance with the general principles of international law, on which this important question depends; and I submit that the passage in *Kent's Commentaries*, to which I have referred, is not qualified by any other proposition laid down by that learned commentator and is decidedly in favour of the view for which I contend.

LORD CAMPBELL C. J. intimated that the Court would hear the argument in *Regina v. Sattler* before giving judgment.

(a) 3 Wheaton Rep. 610.

(b) 5 Wheaton Rep. 412.

(c) 1 Taunt. 26.

(d) 1 Den. C. C. 104.

The Court then proceeded to hear the case of

1858.

REGINA v. SATTLER.

SATTLER'S
Case.

ON the trial of *Christian Sattler* at the Central Criminal Court, the following case was reserved and stated by MARTIN B.

The prisoner was a foreigner. On the 2d *November* 1857, he committed a larceny at *St. Ives* in *Huntingdonshire* and went away from *England* with part of the stolen property to *Hamburg*. The owner of the property gave information to the *London* police, and the deceased, who was a detective officer of that force and an *English* subject, proceeded to *Hamburg* and there, with the assistance of the *Hamburg* police, arrested the prisoner and brought him against his will on board an *English* steamer trading between *Hamburg* and *London* in order that he might be tried for the larceny. *Hamburg* is on the river *Elbe* sixty miles from the sea; but the tide flows higher up than the place where the steamer was when the prisoner was taken on board. The steamer left *Hamburg* on the morning of the 21st *November* the prisoner being in irons, and on the 22d, whilst the steamer was on the high seas, he shot the officer, who afterwards died of the wound. If the killing had been by an *Englishman* in an *English* county it would have been murder. The deceased had no warrant.

The question which I desire to be answered is, whether there was any jurisdiction to try the prisoner at the Old Bailey Sessions. If the answer be in the affirmative, the judgment which has been already given is to be affirmed. If in the negative, the judgment is to be reversed; but the prisoner is to remain in custody to be tried on the indictment which has been found by the grand jury for the larceny.

1858.

 SATTLER'S
Case.

I also request, for my own guidance, the opinion of the Judges upon the following questions.

1st. Was the custody of the prisoner on board the steamer lawful, and is there any distinction as to the times whilst the steamer was in the river *Elbe* and whilst she was upon the high seas?

2nd. Supposing the custody not to have been lawful, was the killing necessarily only manslaughter?

SAMUEL MARTIN.

January 16th, 1858.

The Solicitor General and *Welsby* now appeared on behalf of the Crown; and *Ballantine* Serjt. (instructed by the Solicitor to the Treasury) for the prisoner; for whom *Lilley* and *Tindal Atkinson*, who defended the prisoner in the Central Criminal Court (instructed by the Sheriffs of *London*), also appeared.

Ballantine Serjt., for the prisoner. This case differs from the one last argued in this material point, that the original caption of the prisoner at *Hamburg* was unlawful, and he was taken on board the *English* vessel illegally and against his will.

Under such circumstances he cannot be said to have been "found" within the jurisdiction according to the meaning of section 21 of 18 & 19 *Vict.* c. 91. Having been brought on board the vessel illegally, he is only ostensibly within the jurisdiction of the Central Criminal Court, and that Court had no jurisdiction to try him.

Secondly, the prisoner has committed no offence against the *English* law. He was brought within the jurisdiction by force and owed no allegiance. *Vattel* (a) puts the ground of amenability to the law on the permission given to a foreigner to enter the country; that implies a desire on the part of the

(a) Book 2, s. 101.

foreigner to enter, and cannot apply when he is brought into the country by force.

1858.

 SATTLER'S
Case.

There is no extradition treaty between *Hamburgh* and this country; the person who arrested the prisoner had no warrant, but seized him without even that ostensible authority with which the law arms its officers. The officer was in fact a trespasser, and obtained possession of the person of the accused without authority. There is an impression that a person may go great lengths when so illegally taken. In *Rex v. Stenenson (a)* the prisoner had locked himself in a house to avoid arrest, and an officer without a warrant obtained an entry illegally. He was fired at two or three times by the prisoner, but was not wounded; but another person, who was assisting him, was shot dead by the prisoner through a door. The question arose as to the quality of the crime, and it was held that it was, by the circumstances, reduced from murder to manslaughter.

Lord CAMPBELL C. J.—Being done with the intent of preserving liberty; but it must be taken that here the prisoner killed the officer, not to obtain his liberty, but out of revenge; in which case it is murder even if the custody were unlawful.

The *Solicitor General*. The case states that if the killing had been by an *Englishman* in an *English* county it would have been murder.

COCKBURN C. J.—If a man is taken by a policeman without authority, and, out of revenge for the act, he shoots the officer, that is murder.

Lord CAMPBELL C. J.—We are to assume that a murder was committed. The jury have found that the act was done from *malice prepense*.

Ballantine Serjt. The real question is as to the capacity of a man, under these circumstances, to

(a) 19 How. St. Tr. 846.

1858. commit an offence against the law of this country.

SATTLER'S
Case.

As a foreigner, he owed no allegiance to our laws; and, as he did not enter into our jurisdiction voluntarily, no allegiance was thereby created; no allegiance could be created by our bringing the prisoner forcibly and illegally from his own land.

The *Solicitor General* (Sir H. S. Keating), for the Crown. The discussion of the previous case narrows the argument in this; and I submit that the distinguishing point in this case will not affect the decision, because, assuming the deck of a *British* vessel to be *British* territory, it cannot be maintained that a person who is brought there against his will is not subject to *English* law. If the prisoner had come on board voluntarily and afterwards shot the deceased, the act, being from motives of revenge, would clearly have been murder; and the fact that the prisoner was brought against his will does not release him from liability to punishment. The cases of prisoners of war, who have been convicted of offences in this country, are decisive on that point: *Rex v. Depardo* (a). It has been said that sparing the life of a prisoner of war, who, according to the laws of warfare, might be put to death, creates an implied undertaking on his part to obey the laws of the country of his captor; *Regina v. Serva* (b): but I submit that this is an entire mistake, and that the amenability of a prisoner of war does not rest on any such ground. The true ground upon which allegiance is due is, that amenability to the law arises out of the protection which that law affords. In *Calvin's Case* (c) it is said four kinds of allegiance are found in the law, one of them being *legeantia localis*, "and that is, when an alien that is in amity cometh into *England*, because as long as he is within

(a) 1 Taunt. 26.

(b) 1 Den. C. C. 104.

(c) 7 Rep. 6.

England he is within the King's protection. Therefore, so long as he is here he oweth unto the King a local obedience or ligeance, for that the one, as it hath been said, draweth the other." The prisoner has done an act which, if it had been done by an *Englishman*, would have been murder; and surely it cannot be contended that a foreigner brought into this country against his will would have a right to commit murder with impunity.

1858.

 SATTLER'S
Case.

LORD CAMPBELL C. J.—A prisoner at war committing murder would be triable; but the question is, what constitutes murder? If a prisoner at war who had not given his parole killed a sentinel in endeavouring to effect his escape, would that be murder?

The *Solicitor General*. The nature of the coercion cannot much affect the question. The protection afforded by the *British* law is the same.

MARTIN B.—If a cargo of slaves being carried into slavery arose, and one of them, not to escape but for vengeance, killed the captain, would that be murder?

COCKBURN C. J.—There the slave would be in the position of a natural enemy.

ERLE J.—Persons engaged in the slave trade are taken to be pirates, and therefore *hostes humani generis*.

COCKBURN C. J.—It is not to be assumed that the capture was illegal. We do not know what the law of *Hamburgh* is; and, although there was here no extradition treaty, there may, by the law of *Hamburgh*, be a power of extradition without treaty.

The *Solicitor General*. If the prisoner was wrongly taken into custody, that was an offence not against the prisoner but against the country from which he was taken; but in *The Canadian Prisoners' Case* (a)

(a) 9 Ad. & Ell. 731; S. C. 5 Mee. & W. 32.

1858.
 SATTLER'S
 Case.

it was held that a gaoler, who had persons guilty of treason in his charge, was bound to keep them in prison, however unlawfully they might have been brought into custody. So here, whether the capture was legal or illegal by the law of *Hamburgh*, as soon as the ship got upon the high seas the officer would have been guilty of a dereliction of duty if he had set the prisoner at liberty; and the prisoner could not have obtained his discharge upon a writ of *habeas corpus*. Nor is there any difference as to the jurisdiction if the vessel was on the river *Elbe* and not on the high seas; *Rex v. Allen (a)*. Whether the custody on board the vessel was illegal or not, the prisoner was amenable to the *English* law, and when he killed the deceased from motives of revenge he was guilty of murder.

Ballantine Serjt., in reply. A foreigner brought here against his will is not, while the duress is existing, subject to our laws, and the principle on which I ground this proposition is found in *Vattel*, book 2, s. 101, to which I have before referred, which shews that he must freely enter and that his access is then upon the tacit condition that he shall be subject to the laws of the state. But says *Vattel* (s. 104) "the sovereign ought not to grant an entrance into his state for the purpose of drawing foreigners into a snare;" and *a fortiori* he ought not to bring strangers into his state by force, and then make them subject to its laws. The whole principle on which the allegiance of a foreigner is based is destroyed if he is brought into a country not only against his will but for the purpose of being punished.

If a man is dragged illegally on to *British* ground he does not thereby become a *British* subject or owe allegiance to our laws. Here the prisoner had not voluntarily placed himself under the *British* flag,

(a) 1 Moo. C. C. 494; S. C. 7 Car. & P. 664.

and no country can assume to itself the right to take away the native of a foreign country without a pretence of legal right to do so, and then punish him for a crime which he never would have committed if he had not been thus illegally brought into the jurisdiction within which he commits it.

1858.

 SATTLER'S
Case.

The learned Judges retired, and on their return the judgment of the Court was delivered by

Lord CAMPBELL C. J.—We are all of opinion that in both these cases the conviction must be sustained. In the case of *Lopez* we have no doubt that the offence committed by the prisoner was, under the circumstances, an offence against the laws of *England*. The prisoner, a foreigner, was in an *English* ship—he was under the protection of the *English* laws—and he therefore owed obedience to the *English* laws, and was guilty of an offence against those laws when he maliciously wounded another foreigner, one of the crew of the same ship, whilst on the high seas. It is unnecessary to enter upon a discussion of the authorities cited to prove that proposition—they are quite overwhelming; and I am glad to find that in this respect the law of *America* and of *France* is the same as our own. Then the only other question is, whether there was jurisdiction under the commission of oyer and terminer to try the prisoner at *Exeter* for that offence; and upon that point we entertain as little doubt. The Court at *Exeter* would not have had jurisdiction before the statute 18 & 19 *Vict.* c. 91. s. 21; but that statute is quite conclusive upon the subject, and seems to have been passed for the purpose of removing any doubt that might arise. It provides that offences committed by foreigners in *British* vessels on the high seas may be tried by any Court within the jurisdiction of which the offender is found, if the offence is one which would have been cog-

LOPEZ
and
SATTLER'S
Cases.

1858.

LOPEZ
and
SATTLER'S
Cases.

nizable by such Court, supposing it to have been committed within the limits of its ordinary jurisdiction. Here the offence, if committed within the county of *Devon*, would certainly have been triable at *Exeter*; and, as the prisoner was found within the jurisdiction, it is the same as if the offence had been committed within the limits of that jurisdiction, and we therefore think there was clearly jurisdiction in the Court at *Exeter* to try him there, and that he was legally convicted.

With regard to the case of *Sattler* we think it is equally clear that, although the prisoner was a foreigner, the offence of which he was convicted was an offence against the laws of *England*. It appears that the prisoner, having committed a larceny at *St. Ives* in this country, made his escape and went to *Hamburg*; the deceased, who was a detective officer, followed the prisoner there, and, with the assistance of the *Hamburg* police, he, although he had no warrant, and there appears to be no extradition treaty between the two countries, arrested the prisoner and took him on board an *English* steamer for the purpose of being conveyed to this country and tried for the larceny. During the voyage to *England*, and when on the high seas, the prisoner shot the officer and the officer died. The prisoner was then tried at the Central Criminal Court for murder and was convicted, the jury finding that he committed the crime out of revenge and not with a view of escaping from custody. The case states that if the killing had been by an *Englishman* in an *English* county it would have been murder. Then, here a crime is committed by the prisoner on board an *English* ship on the high seas which would have been murder if the killing had been by an *Englishman* in an *English* county; and we are of opinion that, under these circumstances, whether the capture at *Hamburg* and the subsequent

detention were lawful or unlawful, the prisoner was guilty of murder and of an offence against the laws of *England*; for he was in an *English* ship, part of the territory of *England*, entitled to the protection of the *English* law, and he owed obedience to that law; and he committed the crime of murder—that is to say, he shot the detective officer, not for the purpose of obtaining his liberation, but for revenge and of *malice prepense*. Then comes the question whether the Central Criminal Court had jurisdiction to try the prisoner for this offence; and it appears to us that the late Act of Parliament was framed for the purpose of obviating, and does obviate, all doubt upon such a subject. A man is “found” wherever he is actually present, and the prisoner was found within the jurisdiction of the Central Criminal Court, and we are all of opinion that Court had jurisdiction to try him. My brother *Ballantine* contended that the prisoner was not *found* within the jurisdiction, because he was brought within it against his will; but upon the construction of the statute we are all of a different opinion. Then we are asked whether the prisoner was in lawful custody? It is quite unnecessary to answer that question, because, as he did not commit the offence with a view to his liberation, it is immaterial whether he was in lawful custody or not—he was guilty of murder and the offence was the same even if the custody was illegal. The last question is, supposing the custody not to have been lawful, was the killing necessarily only manslaughter? We are all unhesitatingly of opinion that the killing under such circumstances was not necessarily only manslaughter.

The conviction in this case also will therefore be affirmed.

Convictions affirmed.

1858.

LOPEZ
and
SATTLER'S
Cases.

1858.

REGINA v. FRANCIS GRIFFITHS.

The prisoner, who was convicted of forgery, was a railway station master, and it was his duty to pay *B.* for collecting and delivering parcels for the Company, who provided the prisoner with a form in which to enter, under the heads "Delivery" and "Collecting," the sums so paid by him. The prisoner having falsely told *B.* that the Company had determined to discontinue paying for the delivery of the parcels paid him for the collecting only, but in his accounts with the Company continued to charge them with payments purporting to be made to *B.* for delivery; and, in order to furnish a voucher, the prisoner continued to fill up the form as before, and, after paying the servant of *B.* the sum entered in the column for collecting, wrote the words "Received for *B.*" which *B.*'s servant signed; and the prisoner afterwards placed a receipt stamp under such signature, and put on it a sum in figures equal to the sums inserted in the two columns for collecting and delivery. The jury found that the document thus added to meant differently to what it meant before. *Held*, that this was a forgery and that the conviction was right.

THE following case was reserved and stated by *BRAMWELL B.*

The prisoner was convicted before me at the last *Carmarthenshire* Assizes of forgery, and sentenced to one year's imprisonment with hard labour. He was station master at the *Narberth Road* Station of the *South Wales* Railway. One *Bowers* collected and distributed parcels that were sent from and arrived at the station. For each service he was entitled to payment, which the prisoner ought to have made to him. Printed forms were furnished the prisoner, one of which accompanies this. These printed forms he had to fill up and return. He told *Bowers* that the Company had determined not to pay him anything for delivery, but only for collecting. *Bowers* assented. This statement of the prisoner was untrue, and he continued to charge the Company with payments, purporting to be made to *Bowers*, for delivery. In order to furnish a voucher to the Company for these alleged payments, the prisoner continued to fill up the sheets as before, and then on the right hand side of the dividing line wrote as is seen in the form annexed, "Reced. pro *Wm. Bowers.*" The prisoner paid *Allen*, *Bowers*' servant, the amount of the right hand column only, and then procured *Allen* to sign the receipt, and when *Allen* had signed it, the pri-

soner, unknown to *Allen* or *Bowers*, put a receipt stamp under *Allen*'s name, and on it put a sum in figures the aggregate of both columns. I left it to the jury to say whether the document thus added to meant differently to what it meant before. They found it did. The conviction is right unless I ought to have directed an acquittal, as to which I have to request the opinion of the Court of Criminal Appeal.

1858.

GRIFFITHS'S
Case.

G. BRAMWELL.

The form referred to in the case was headed "*South Wales* Railway. An account of parcels inwards and outwards;" and the following is a copy of the part of the form material to the case:—

EXPENSES.

DELIVERY.	COLLECTING.
Paid to Bowers £2 0 0	Paid to Bowers . £1 0 0
2 0 0	1 0 0
at 2 0 0	at 1 0 0
2 0 0	1 0 0
2 0 0	Recd. pro Wm. Bowers 1 0 0
2 0 0	Jno. Allen 1 0 0
2 0 0	1 0 0
2 0 0	Stamp 1 0 0
2 0 0	1 0 0
2 0 0	£39 : 0 : 0 1 0 0
2 0 0	1 0 0
2 0 0	1 0 0
£26 0 0	£13 0 0

Superintendent.

This Account is to be attached to the Weekly Abstract (No.), and is to be accompanied by receipts for the amounts paid for collecting and delivering, either on this or a separate paper.

1858. This case was considered on the 24th *April*, 1858,
 GRIFFITHS'S by POLLOCK C. B., WILLES J., BRAMWELL B., CHAN-
 Case. NEL B. and BYLES J.

Hardinge Giffard appeared for the Crown, but was not called upon by the Court; no counsel appeared for the prisoner.

POLLOCK C. B.—This conviction must be affirmed.
 Conviction affirmed.

1858.

REGINA v. MOAH.

The false making of a letter of recommendation with intent fraudulently to obtain a situation as a police constable, is a forgery at common law (BRAMWELL B. dubitante.)

THE following case was reserved and stated by BRAMWELL B.

The prisoner was convicted before me at the last *Chester* assizes. The first four counts of the indictment charged the forgery and uttering by the prisoner of a letter purporting to be written by one *Oakley*. The next four contained the same charges as to a letter purporting to be written by one *Godley*. The 9th count charged the prisoner with forging the letter purporting to be signed by *Oakley*, with intent fraudulently to obtain, and whereby he did fraudulently obtain, a situation as police constable in the *Cheshire* force. The 10th was the same as the 9th, save that it related to the letter purporting to be signed by *Godley*. The 11th was for uttering the two letters, knowing them to be forged, to the chief constable of the *Cheshire* force, with intent to deceive him, and obtain from him, having power to grant it, a place in the force, and whereby he got such place. The 12th count was for falsely pretending those letters were genuine, and

thereby obtaining the situation of constable. The letters were as follows:—

1858.

 MOAH'S
Case.

“ Chief Constable’s Office, *Carlisle*.

“ Sir, “ *Novr. 4th, 1857.*

“ I am directed by the chief constable to acquaint you that constable *Moah* resigned his situation at his own request; his character very good.

“ Enclosed I send his papers.

“ I am, Sir,

“ *Geo. W. Oakley,*

“ Supt. C. & W. C. C.

“ To whom this may concern.”

“ *Liverpool, May 18th, 1857.*

“ Sir, “ *No. 7, Pleasant Hill St.*

“ I hereby certify that I have known *Charles Moah* upwards of seven years. I can say with confidence he is a sober steady man, and I can with great confidence recommend him to the situation as police constable.

“ I have had him in my employ for some time and found him a very upright man.

“ I am your’s

“ Respectfully,

“ *T. Dunne, Esq.*

“ *W. Godley.*”

The prisoner forged them and uttered them to Captain *Smith* the chief constable, and by means of them got a situation as constable. Entertaining doubts if any offence was disclosed or proved, I reserved the question and released the prisoner on bail.

G. BRAMWELL.

This case was argued on 24th *April*, 1858, before POLLOCK C. B., WILLES J., BRAMWELL B., CHANNELL B. and BYLES J.

1858.

MOAH'S
Case.

McIntyre appeared for the Crown ; no counsel appeared for the prisoner.

McIntyre, for the Crown. This is a forgery at common law. In *Regina v. Sharman* (a) it was held that the uttering a forged testimonial to character, knowing it to be forged, with intent to deceive and thereby obtain an appointment as schoolmaster, was an offence at common law.

BRAMWELL B.—That was not cited at the trial.

McIntyre. The case of *Regina v. Toshack* (b) was decided before *Regina v. Sharman*. The forgery there was of a certificate under the hand of the master of a vessel, certifying that the prisoner was an able seaman, with intent to deceive, and the prisoner was held guilty of a forgery. Those decisions are in point in this case which is within the definition in 2 *Russell on Crimes*, 318, “a false making, a making *malo animo*, of a written instrument for the purpose of fraud and deceit.”

POLLOCK C. B.—In *Regina v. Hodgson* (c), which was the case of forging a diploma of the College of Surgeons, the conviction was quashed on the ground that the prisoner had no intent, in forging or in uttering, to commit any particular fraud, nor was there in fact any person defrauded.

McIntyre. Here the prisoner forged and uttered the testimonials, and by means of them procured the appointment.

BRAMWELL B.—The letters are of no validity in themselves, and I do not know but that the office might have been obtained without them, although they may have had an operation on the mind of him to whom they were presented. It seemed to me at the trial no more than if I were to produce a letter pur-

(a) 1 Dears. C. C. 285.

(b) 1 Den. C. C. 492.

(c) *Antè*, p. 3.

porting to be from the Duke of *Wellington* inviting me to dine, and say, See what a respectable person I am.

1858.

MOAH'S
Case.

POLLOCK C. B.—We are all agreed that this conviction must be affirmed.

BRAMWELL B.—It seems to me to be a questionable matter; but I do not say that the conviction is not right.

REGINA v. SAMUEL SMITH and SARAH SMITH.

1858.

THE following case was reserved and stated by CHANNELL B.

At the last Assizes for the county of *Gloucester* the said *Samuel Smith* and *Sarah Smith* were jointly tried before me and found guilty on a count charging them with feloniously wounding one *John Leach* with intent to disfigure him, and in another count with intent to do the said *John Leach* grievous bodily harm.

For the purposes of this case the conviction of *Sarah Smith* is to be deemed and taken to be a good conviction, unless the same ought to be reversed by reason of the facts following found by the jury, viz. that the said *Sarah Smith* was at the time of the commission of the offence the wife of the said *Samuel Smith*; that she acted under the coercion of her husband, and that she herself did not personally inflict any violence upon the said *John Leach*.

A verdict of guilty was entered against the husband and wife.

I passed sentence on the said *Samuel Smith*.

I reserved for the consideration of this Court the question whether upon the aforesaid finding the conviction of the said *Sarah Smith* was a good conviction.

A wife was convicted, jointly with her husband, upon an indictment, one count of which charged a felonious wounding with intent to disfigure; and another count alleged the intent to be to do grievous bodily harm.

The jury found that the wife acted under the coercion of her husband, and that she herself did not personally inflict any violence upon the prosecutor. Held, that the conviction of the wife was wrong.

1858.
SMITH'S
Case.

tion, respiting the sentence upon her and taking bail for her appearance hereafter to receive judgment if the conviction should be affirmed.

The question for the opinion of the Court is, whether *Sarah Smith*, the wife of the said *Samuel Smith*, having acted under his coercion, and not having herself inflicted any violence on the said *John Leach*, can be properly convicted of the offence before mentioned.

See *Cruse's Case*, 8 C. & P. 545; *Taylor on Evidence*, vol. 1, p. 162, and the cases there cited (a).

W. F. CHANNELL.

This case was considered on the 24th *April*, 1858, by POLLOCK C. B., WILLES J., BRAMWELL B., CHANNELL B. and BYLES J.

No counsel appeared.

POLLOCK C. B.—The jury have disposed of this case by their finding. They have found that *Sarah Smith* was a married woman; that she acted under the coercion of her husband, and that she herself did not personally inflict any violence upon the prosecutor. The conviction therefore, so far as it extends to her, must be reversed.

Conviction of *Sarah Smith* reversed.

(a) It appeared on the trial that the wife, acting, as the finding of the jury established, under the coercion of her husband, wrote letters to the prosecutor pretending that she had become a widow, and requesting a meeting at a distant place. The meeting was

granted, and the wife, dressed as a widow, met the prosecutor at a railway station, and induced him to go with her to a lonely spot where the husband fell upon him and inflicted the injuries alleged in the indictment.

REGINA *v.* JOHN JONES and HENRY JONES. 1858.

THE following case was reserved and stated by
BRAMWELL B.

The prisoners were convicted before me at the last assizes at *Cardigan*, and sentenced each to one month's imprisonment, with hard labour, and five years' reformatory, on an indictment under 7 & 8 *Geo.* 4. c. 29. s. 44., which charged that they stole, and that they ripped with intent to steal, certain metal fixed in land. The property was laid in the perpetual curate of the parish, and in the churchwardens and overseers, naming them. It was proved that in the churchyard of the parish in question stood a wooden post; fixed on the top of this post was a sun dial made of copper; this the prisoners had taken off the post, probably by removing the screws with which it was fastened. Entertaining doubts whether the case was within the statute, I reserved the case for the opinion of the Court of Criminal Appeal.

G. BRAMWELL.

The prisoners were convicted upon an indictment, framed upon section 44 of 7 & 8 *Geo.* 4. c. 29. of stealing metal fixed in land in a place dedicated to public use. It was proved that they had stolen a copper sundial fixed on the top of a wooden post standing in a churchyard. Held (BRAMWELL B. dissentiente) that the conviction was right.

This case was argued on 24th *April*, 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

Bowen appeared for the Crown; no counsel appeared for the prisoner.

Bowen, for the Crown. This indictment is framed upon section 44 of 7 & 8 *Geo.* 4. c. 29, which enacts "that if any person shall steal, or rip, cut or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper,

1858.

JONES'S
Case.

brass or other metal, or any utensil or fixture whether made of metal or other material respectively, fixed in or to any building whatsoever, or anything made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden or area, or in any square, street or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street or other like place, it shall not be necessary to allege the same to be the property of any person."

A churchyard is a place dedicated to public use within the meaning of this section. In *Rex v. Blick* (a) the prisoner was indicted for receiving stolen brass, and the indictment alleged that one *E. Smith* had been convicted of stealing the brass in question fixed in a churchyard, being "a place dedicated to public use." Evidence was given that the brass was fixed into many of the tombstones in the churchyard, and it was objected that the words "other place dedicated to public use or ornament" meant places *ejusdem generis* with "square" and "street." The prisoner was acquitted; but *Bosanquet J.*, in reference to this objection, said that he was of opinion that a churchyard was a place dedicated to public use within the meaning of the statute; and his lordship added, "If the prisoner is convicted I do not say that I will reserve the point, but I will take it into further consideration." There is a previous case of *Rex v. John and Daniel Jones*, cited in 2 *Russ. on Crimes*, 65, from a MS. of Mr. *Greaves*, and not elsewhere reported. There the prisoners were indicted for receiving brass, knowing it to have been stolen,

and it was proved that the brass had been a plate affixed by rivets to a tombstone in a churchyard, and that the tomb was formed of one flat stone at the top, which was supported by others beneath. *Vaughan B.*, who tried the case, thought that the words of the statute extended to every kind of building, and that the tomb might be said to be a building; but on being referred to *Rex v. Reece* (a) he expressed doubts whether the tomb could be considered a building within the meaning of the Act; but he thought the words "place dedicated to public use or ornament" were sufficiently general to include the case, and the prisoners were convicted. *Vaughan B.* having postponed the case to consult with *Parke J. A. J.*, the prisoners were afterwards sentenced without any further notice being taken of the point.

BRAMWELL B.—The difficulty I feel is, not as to a churchyard being a place dedicated to public use—no doubt it is dedicated to public use in a certain sense, but as to whether such a place is within the meaning of the statute. The 44th section first speaks of metal fixed to a building, then of metal fixed in any land, being private property; then of metal fixed for a fence to any dwelling-house, garden or area; then of metal fixed for a fence in "any square, street or other place dedicated to public use or ornament." This shews to my mind that by "other place dedicated to public use or ornament" the legislature meant place *ejusden generis* with "square" and "street." Again, is metal, fixed on a post let into the ground, metal fixed in land within the meaning of this section?

POLLOCK C. B.—I believe all the rest of us are agreed that this was metal fixed in land in a place dedicated to public use within the meaning of the section.

(a) MS. 2 Russ. on Crimes, 65.

1858.

JONES'S
Case.

1858. **JONES'S Case.** **BRAMWELL B.**—I own I cannot see that this case is within the meaning of the Act. This was not metal fixed in land being private property, nor was it part of a fence of any dwelling-house or of any square or street. I doubt if a churchyard is a public place within the meaning of the section; and I also doubt whether a piece of metal put on the top of a piece of wood fixed in the ground is metal fixed in land within the meaning of the section.

WIGHTMAN J.—I cannot see any doubt as to a churchyard being a public place within the meaning of the statute; and the post with the metal fixed upon it became part of the land.

WILLES J.—If the view taken by my brother **BRAMWELL** be correct, it would be larceny to steal the railings in *Hanover Square*, but it would not be larceny to steal the statue of *William Pitt*.

BYLES J. concurred with the majority of the Court.
Conviction affirmed.

1858.

REGINA v. JAMES WILSON.

The master of a vessel having made and signed a report of a seaman's character upon his discharge, in the form

THE following case was reserved on the Northern Spring Circuit, 1858, at *Liverpool*, by **MARTIN B.**

The indictment contained several counts. The first set were founded upon an alleged offence under the statute 17 & 18 *Vict.* c. 104. s. 176. (The Merchant

sanctioned by the Board of Trade, the shipping master gave the seaman a copy of such report. The prisoner knowingly and fraudulently made a facsimile of this report; but, instead of writing the letter *M.*, which stood in the original to indicate that the seaman's character for ability and conduct was middling, wrote *G.* indicating that it was good. *Held*, that the prisoner was guilty of an offence within section 176 of the 17 & 18 *Vict.* c. 104.

Quære, whether the act of the prisoner amounted to forgery at common law.

Shipping Act, 1854). The second set alleged a forgery at common law. 1858.

WILSON'S
Case.

The facts were these:—A seaman named *Alfred Goddard* had served on board a *British* ship, called "*The Maria Santa Maria*," on a voyage from *Liverpool* to *The Spanish Main* and back, and had arrived in *Liverpool* shortly before the 8th *January* last. Upon that day he was duly discharged in the presence of *John Laidman*, a shipping master duly appointed under the above Act, and the master, *John Guthrie*, made and signed before the said shipping master, in the form sanctioned by the Board of Trade, a report of the character of the said *Alfred Goddard*, and the shipping master delivered to *Alfred Goddard* a copy of the report. As the report was made and signed and in the copy delivered to *Alfred Goddard*, opposite to the space for "character for ability in whatever capacity" was put the letter *M.* which signified that it was middling. A facsimile of the altered document is annexed to this case, and in every respect except the letter *G.* instead of *M.* it is an exact imitation of the original one.

Goddard having heard that the prisoner was in the habit of altering such documents, went to him, and he for half a crown made and delivered to him (*Goddard*) a fresh one, being a facsimile of and a very good imitation of the genuine one, with the exception that the letter *G.*, which signified good, was substituted for the letter *M.* in the place before mentioned. At his house there was afterwards found the genuine document, but with the letter *G.* substituted for *M.* It appeared as if the prisoner had been dissatisfied with the manner of the alteration, and made out a complete new one for *Goddard*. A book was found in his house containing a number of printed blank

1858.
WILSON'S
Case.

certificates bound up, one of which had been filled up by him and torn out and delivered to *Goddard*.

The Attorney General for the county palatine, who conducted the prosecution, expressed some doubt as to whether there was an offence within the 176th section of the statute, and I thought that there was great doubt whether it was a forgery at common law. See *The Queen v. Hodson*, 1 Dearsly & Bell, 3.

I request the opinion of the Court of Criminal Appeal upon the following questions:—

1st. Was there an offence against the statute?

2nd. Was there an offence at common law?

If the Court be of opinion that there is no offence against either, they will please direct the prisoner to be discharged.

SAMUEL MARTIN.

April, 22, 1858.

Section 176 of The Merchant Shipping Act, 1854 (17 & 18 *Vict.* c. 104.), enacts that "Upon every discharge effected before a shipping master, the master shall make and sign, in a form sanctioned by the Board of Trade, a report of the conduct, character and qualifications of the persons discharged, or may state, in a column to be left for that purpose in the said form, that he declines to give any opinion upon such particulars or upon any of them; and the shipping master shall transmit the same to the Registrar General of Seamen, or to such other person as the Board of Trade directs, to be recorded, and shall, if desired so to do by any seaman, give to him or indorse on his certificate of discharge a copy of so much of such report as concerns him; and every person who makes, assists in making, or procures to be made any false certificate or report of the service, qualifications, con-

duct or character of any seaman, knowing the same to be false ; or who forges, assists in forging or procures to be forged, or fraudulently alters, assists in fraudulently altering, or procures to be fraudulently altered any such certificate or report, or any copy of any certificate or report which is forged or altered or does not belong to him, shall for each such offence be deemed guilty of misdemeanor."

1858.
WILSON'S
Case.

The following is a copy of the document referred to in the above case :—

(E-1)



SANCTIONED BY
THE BOARD OF TRADE
MAY 1855.
IN PURSUANCE OF
17 & 18 VICT. C. 104.

90

CERTIFICATE OF CHARACTER.

Character for ability } *G*
in whatever capacity }

Character for Conduct *G*

I *Certify* the above to be a true Copy of so much of the Report of Character made by the said Master on the termination of the said Voyage as concerns the said Seaman.

Dated at Lpool. this 8th day of Jany. 1858.

Signed John Guthrie Master of the Ship.

J. Laidman Shipping Master.

For Signature of Seaman see back.

NOTE. Any Person who fraudulently forges or alters a Certificate of Character or makes use of one which does not belong to him may either be prosecuted for a Misdemeanor or may be summarily punished by a Penalty not exceeding £100 or imprisonment with hard labour not exceeding six months.

1858. This case was considered, on the 1st *May* 1858, by
 WILSON'S POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL
 Case. B. and BYLES J.

Bliss Q. C. (with him *Fitzpatrick*) appeared for the Crown, but was stopped by the Court. No counsel appeared for the prisoner.

POLLOCK C. B.—We are all agreed that the defendant was guilty of misdemeanor within the 176th section of the statute. It is sufficient to say that he made a false document by substituting the letter *G.*, which signified that the ability and conduct of the seaman were good, for the letter *M.*, which in the original indicated that his ability and conduct were middling. The offence is directly within the words of the section.

Conviction affirmed.

1858,

REGINA *v.* EDWARD THORPE.

The prisoner was convicted of embezzlement on an indictment which charged that he received the money for and in the name and on the

THE following case was reserved and stated by the Chairman of the West Riding Sessions of the county of *York*.

Edward Thorpe was tried before me at the West Riding Sessions of the county of *York*, on the 26th day of *August* 1857, on an indictment which in separate counts charged him that he, being the servant

account of his master. It appeared that the prisoner's master was agent for a railway Company for delivering goods, and that he employed his own servants (of whom the prisoner was one), and used his own drays and horses, and was answerable to the Company for monies collected by his servants for carriage. It was the duty of the prisoner to go out with a dray, to take with him goods and a delivery book handed to him by a clerk of the Company, and to receive the amount of carriage therein specified as due to the Company, and then to account for the sums so received with the Company's clerk. The sums charged as embezzled were sums received by the prisoner for carriage and entered in the delivery book, and such sums were paid to the prisoner and received by him as due to the Company, and he gave receipts for the same in the name of the Company. *Held*, that the conviction was right as, although the prisoner received the money "in the name" of the Company, he received it "on account" of his master.

of *Charles Hardy*, on three several days in *August* 1856, did receive and take into his possession three sums of money, amounting in the whole to the sum of six pounds, *for and in the name and on the account* of the said *Charles Hardy* his master, and the said money then fraudulently and feloniously did embezzle.

1858.

THORPE'S
Case.

It was proved that *Charles Hardy* was agent for *The Great Northern Railway Company* at *Huddersfield* for the purpose of carrying out goods to be there delivered by the Company, and that he employed his own servants and used his own drays and horses, and was answerable to the Company for monies collected by his servants for carriage of goods, and that the prisoner, in *August* 1856, was his servant, and that as such servant it was his, the prisoner's duty to go out with a dray, to take with him goods and a delivery book handed to him by *James Esplin* a clerk in the service of *The Great Northern Railway Company*, and to deliver the goods according to the directions contained in the delivery book, and to receive the amount of carriage therein specified as due to the said Company, and *then to account for the sums so received* with the said *James Esplin*. That he had taken out goods for the said *Great Northern Railway Company* at the times stated in the indictment, and had received from the persons to whom they were directed for the carriage due to the said railway Company the amounts put opposite to their names and description of goods in the said delivery book, amounting altogether to the sum of 6*l.*, which sums were paid to the prisoner and received by him as due to the Company, the receipts for which were given by the prisoner, and made out in the name of *The Great Northern Railway Company*.

It was also proved that the prisoner never accounted

1858.
THORPE'S
Case.

to the said *James Esplin* for or paid over to him these sums nor to his master *Charles Hardy*, but absconded, and the amounts so received and unaccounted for by the prisoner were thereupon paid by *Charles Hardy* to *James Esplin* on account of the said Company, in pursuance of his arrangement with them in that behalf.

At the close of the case for the prosecution, the prisoner's counsel objected that there was no case to go to the jury, inasmuch as, though the evidence proved that at the times the supposed embezzlements took place the prisoner was the servant to *Charles Hardy* as alleged in the indictment, yet it also proved that the prisoner received and took into his possession the money so said to be embezzled, not in the name and on the account of the said *Charles Hardy* his master, but in the name and on the account of *The Great Northern Railway Company*, who were not the prisoner's masters; and therefore that the charge stated in the indictment was not proved. I refused to stop the case, and put these four questions to the jury.

1. Was prisoner *Hardy's* servant?
2. Did he receive 3*l.* 3*s.* 9*d.* (one of the sums)?
3. Did he fraudulently appropriate that sum?
4. Did he receive the money on account of *Hardy*?

The counsel for the prisoner objected that this fourth question could not be put, as the evidence proved that the money was received on account of *The Great Northern Railway Company*, and that there was no evidence for the jury on the present charge as to that fourth question.

The jury, without answering the questions, returned a general verdict of "Guilty."

The question for the opinion of the Court of Appeal is, whether there was evidence for the prosecution to

go to the jury on that fourth question, or whether I ought to have directed an acquittal for the reasons urged by the defendant's counsel. 1858.

THORPE'S
Case.

The prisoner was sentenced by me to six months' imprisonment, but admitted to bail until the opinion of the Court of Criminal Appeal could be had.

This case was considered, on 1st *May* 1858, by POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

No counsel appeared.

POLLOCK C. B.—The indictment in this case is for embezzling money which it is alleged the prisoner took into his possession “for and in the name and on the account of his master.” It was proved that the prisoner's master was answerable to *The Great Northern Railway Company* for the money received by him; but that the money in question was received by the prisoner in the name of the Company, and not in the name of his master. Under these circumstances a doubt appears to have arisen whether the prisoner, having received the money not in the name of his master but in the name of the Company, the conviction can be sustained. The 47th section of the statute 7 & 8 *Geo.* 4. c. 29. is in these words, “for or in the name or on the account of his master;” and it is clear that, although the prisoner received the money in the name of the Company, he received it on account of his master.

Conviction affirmed (a).

(a) See *Regina v. Beaumont*, Dears. C. C. 270.

1858.

REGINA v. JOHN SMITH.

The prisoner was convicted of forgery. It appeared that one *Borwick*, the prosecutor, sold powders called "*Borwick's Baking Powders*" and "*Borwick's Egg Powders*," which powders he invariably sold in packets wrapped up in printed papers. The prisoner procured 10,000 wrappers to be printed similar, with some exceptions, to *Borwick's* wrappers. In these wrappers the prisoner enclosed powders of his own which he sold for *Borwick's* powders; and it was for the forgery and uttering of these wrappers that the prisoner was indicted.

The jury found that the wrappers so far resembled *Borwick's* as to deceive persons of ordinary observation and to make them believe them to be *Borwick's*, and that they were procured and used by the prisoner with intent to defraud. Held, that the conviction was wrong.

THE following case was reserved and stated by the Recorder of *London*.

John Smith was tried before me, at the Central Criminal Court, upon an indictment charging him with forging certain documents and with uttering them knowing them to be forged.

It appeared that the prosecutor *George Borwick* was in the habit of selling certain powders, some called *Borwick's Baking Powders* and others *Borwick's Egg Powders*.

These powders were invariably sold in packets, and were wrapped up in printed papers.

The baking powders were wrapped in papers which contained the name of *George Borwick*; but they were so wrapped that the name was not visible till the packets were opened.

It was proved that the prisoner had endeavoured to sell baking powders, but had them returned to him because they were not *Borwick's* powders.

Subsequently he went to a printer, and, representing his name to be *Borwick*, desired him to print 10,000 labels as nearly as possible like those used by *Borwick*, except that the name of *Borwick* was to be omitted in the baking powders (*a*).

The labels were printed according to his order,

(*a*) This seems to be an error. and the notification that without
The name of *Borwick* was on the such signature no powder was
labels, but the signature of *Borwick*, genuine, were omitted.

and a considerable quantity of the prisoner's powders were subsequently sold by him as *Borwick's* powders wrapped in those labels.

1858.

SMITH'S
Case.

On the part of the prisoner it was objected that the making or uttering such documents did not constitute the offence charged in the indictment.

This point I determined to reserve for the consideration of the Court of Criminal Appeal; and I left it to the jury to find whether the labels so far resembled those used by *Borwick* as to deceive persons of ordinary observation and to make them believe them to be *Borwick's* labels, and whether they were made and uttered by him with intent to defraud the different parties by so deceiving them, directing them in that case to find the prisoner guilty.

The jury found him guilty.

The labels marked "genuine," sent herewith, were those used by the prosecutor; those marked "*imitation*" were the labels the subject of this prosecution, and reference can be made to them if necessary.

The prisoner has been admitted to bail to await the decision of the Court for the consideration of Crown Cases upon the foregoing facts.

Russell Gurney.

The following is a copy of the genuine baking powder label:—

Patronized by the Army and Navy.—Borwick's
Original German Baking Powder for making
Bread without Yeast, and Puddings without Eggs.
(Directions improved by the Queen's Private
Baker.)

By the use of this preparation, as the saccharine properties of the Flour, which are destroyed by Fermentation with Yeast, are preserved, the Bread is not

1858. only more nutritive, but a larger quantity is obtained from the same weight of Flour.

SMITH'S
Case.

Bread made with Yeast, if eaten before it becomes stale, ferments again in the stomach—producing Indigestion and numerous other complaints; when made with this Powder it is free from all such injurious effects.

The Powder is equally valuable in making Puddings and Pastry, which it deprives of all their indigestible properties; and if Dripping or Lard be used instead of Butter, it removes all unpleasant taste.

It will keep any length of time and in any climate. In the sick Hospitals of the Crimea it was found invaluable.

The public are requested to see that each Wrapper is signed

George Borwick.

Without which none is Genuine.

Sold Retail by most Chemists in 1d. 2d. 4d. and 6d. packets, and in 1s. 2s. 6d. and 5s. tins.

Wholesale by George Borwick, 24 and 25, London Wall, London.

The imitation label which the prisoner used was as follows:—

Patronized by the Army and Navy.—Borwick's Original German Baking Powder for making Bread without Yeast, and Puddings without Eggs. (Directions improved by the Queen's Private Baker.)

By the use of this preparation, as the saccharine

properties of the Flour, which are destroyed by Fermentation with Yeast, are preserved, the Bread is not only more nutritive, but a larger quantity is obtained from the same weight of Flour.

Bread made with Yeast, if eaten before it becomes stale, ferments again in the stomach—producing Indigestion and numerous other complaints; when made with this Powder, it is free from all such injurious effects.

The Powder is equally valuable in making Puddings and Pastry, which it deprives of all their indigestible properties; and if Dripping or Lard be used instead of Butter, it removes all unpleasant taste.

It will keep any length of time and in any climate. In the Sick Hospital of the Crimea it was found invaluable.

1858.

SMITH'S
Case.

Sold Retail by most Chemists in 1d. 2d. 4d. and 6d. packets, and in 1s. 2s. 6d. and 5s. tins.

The following is a copy of the genuine egg powder label:—

BORWICK'S METROPOLITAN EGG POWDER.

A Vegetable Compound, being a valuable substitute for EGGS. One packet is sufficient for two pounds of flour, and equal to four eggs.

Directions.—Mix with the flour, then add water or milk, for Plum, Batter, and other Puddings, Cakes, Pancakes, &c.

PRICE ONE PENNY.

To be had of all Grocers, Oilmen and Cornchandlers.

This label was imitated by the prisoner exactly, without any alteration whatever.

1858.

SMITH'S
Case.

This case was argued, on the 24th of *April* 1858, before POLLOCK C. B., WILLES J., BRAMWELL B., CHANNELL B. and BYLES J.

Huddleston Q. C. (*Poland* with him) appeared for the Crown, and *M'Intyre* for the prisoner.

M'Intyre, for the prisoner. The real offence committed by the prisoner was that he put off his own baking powder and egg powder as *Borwick's* Baking Powder and Egg Powder; passing off the spurious powder as genuine by means of the printed wrapper. A printed wrapper like this is not a document, and is not the subject of forgery at common law. In *Regina v. Closs* (a) it was held that forgery must be of some document or writing, and therefore that the painting an artist's name in the corner of a picture, in order to pass it off as an original picture by that artist, was not a forgery.

POLLOCK C. B.—Suppose a man opened a shop and painted it so as exactly to resemble his neighbour's, would that be forgery?

M'Intyre. No. The case of *Regina v. Toshack* (b) will perhaps be relied on by the other side. It was there held that a false certificate in writing of the good conduct of a seaman was the subject of an indictment at common law; but here there was no false certificate, and placing the powder within these wrappers was no more than asserting that the powder was manufactured by *Borwick*.

The Court here called upon

Huddleston Q. C., for the prosecution. The jury have found that the labels were made and uttered by the prisoner with intent to defraud. They are therefore false documents made and uttered by the prisoner with intent to defraud, and the prisoner is properly convicted of forgery. In 4 *Black. Com.* 247, cited in

(a) *Antè*, p. 460.

(b) 1 Den. C. C. 492.

2 *Russell on Crimes*, 318, forgery is defined to be "the fraudulent making or alteration of a *writing* to the prejudice of another man's right." In 2 *East P. C. c.* 19, s. 1, p. 852, also there cited, the definition is "a false making or making *malo animo* of any written instrument for the purpose of fraud and deceit." The definition of *Grose J.*, in *Rex v. Parkes and Brown (a)*, is: "The false making a *note* or *other instrument* with intent to defraud." The definition in 4 *Comyn's Digest*, 406, tit. Forgery (A. 1): "Forgery is where a man fraudulently writes or publishes a false deed or *writing* to the prejudice of the right of another;" and again in the same page, note (d) 7: "And finally it is now settled that the counterfeiting of *any writing* with a fraudulent intent, whereby another may be prejudiced, is forgery at common law." A printed document may be the subject of forgery as well as a written one. In *Tomlin's Law Dictionary*, forgery is defined as "the fraudulent making or alteration of any record, deed, writing, *instrument, register, stamp, &c.*, to the prejudice of another man's right." Forgery may therefore be properly defined as the alteration or making a false *document* with intent to defraud; and looking at the finding of the jury this instrument comes within that definition.

POLLOCK C. B.—It is elevating a wrapper of this kind very much to call it a document or instrument.

Huddleston Q. C. This is a printed forgery. In *Regina v. Hodgson (b)* the document alleged to have been forged was a diploma of the College of Surgeons; and the ground on which the conviction was quashed was, not that such a document was not the subject of forgery, but because there was no evidence of an

1858.

SMITH'S
Case.

(a) 2 Leach. C. C., 4th ed., 785; Stark. Crim. Pl., 2nd ed., 503.

(b) *Antè*, p. 3.

1858. intention to defraud any particular person. All that
 SMITH'S was decided in *Regina v. Closs* (a) was that an artist's
 Case. name painted upon a picture was an arbitrary mark
 by which the artist was enabled to identify his own
 work, and was not such a writing as could be the
 subject of forgery.

BRAMWELL B.—Suppose the prisoner had written
 a letter, purporting to come from *Borwick*, stating
 that the powder was genuine?

Huddleston Q. C. I submit it makes no difference
 whether the representation is written or printed.
 These labels are made to resemble *Borwick's* labels,
 and are in the nature of certificates that the powder
 is genuine. In *Regina v. Toshack* (b) a certificate by
 the master of a vessel of the service and good conduct
 of a seaman was held to be the subject of forgery at
 common law. That the document there was as to
 the character of an individual is an immaterial ingre-
 dient in the case; and it would have been equally
 the subject of forgery if it had been as to any other
 matter, the intent being to defraud.

In *Regina v. Sharman* (c) the certificate of a
 clergyman that the prisoner had had the charge of a
 school was in like manner held to be the subject of
 forgery. The wrapper in this case identifies the
 powder as having been manufactured by *Borwick*,
 and is as it were a certificate of the character of the
 article enclosed. The certificates in the cases of
Toshack and *Sharman* certified that a man had done
 certain things. Here the wrapper is in effect a cer-
 tificate that *Borwick* had put his powder in the packet.
 In those cases it would have made no difference if the
 entire documents had been printed. Bank of *England*
 notes are now entirely printed.

(a) *Antè*, p. 460.

(b) 1 Den. C. C. 492.

(c) *Dears*. C. C. 285.

WILLES J.—The forgery of bank notes is provided for by statute.

1858.

SMITH'S
Case.

Huddleston Q. C. Here the entire document is not imitated, but that will not affect the question. Where the offence consists in the false making of an instrument in resemblance of another genuine instrument it is not essential that the resemblance should be complete in every respect. It is sufficient if it be strong enough to effect the particular fraud and to prevail over that degree of caution, prudence and discretion which ought to be used in the usual course of affairs; and here the jury have found that the labels so far resembled those used by *Borwick* as to deceive persons of ordinary observation and to make them to believe them to be *Borwick's* labels. On this point (which was not dealt with in the judgment) the learned counsel cited *Rex v. Elliot* (a), *Rex v. Collicott* (b) and *Starkie Crim. Pl.*, 2d ed., 503, 504.

M'Intyre, in reply, was stopped by the Court.

POLLOCK C. B.—We are all of opinion that this conviction is bad. The defendant may have been guilty of obtaining money by false pretences; of that there can be no doubt; but the real offence here was the inclosing the false powder in the false wrapper. The issuing of this wrapper without the stuff within it would be no offence. In the printing of these wrappers there is no forgery, nor could the man who printed them be indicted. The real offence is the issuing them with the fraudulent matter in them. I waited in vain to hear Mr. *Huddleston* shew that these wrappers came within the principle of documents which might be the subject of forgery at common law. Speaking for myself, I doubt very much whether these papers are within that principle. They are

(a) 1 Leach. C. C., 4th ed., 175. S. C. 4 Taunt. 300; 2 Leach. C. C.,
(b) Russ. & Ry. C. C. 212; 4th ed., 1048.

1858.

SMITH'S
Case.

merely wrappers, and in their present shape I doubt whether they are anything like a document or instrument which is the subject of forgery at common law. To say that they belong to that class of instruments seems to me to be confounding things together as alike which are essentially different. It might as well be said, that if one tradesman used brown paper for his wrappers, and another tradesman had his brown paper wrappers made in the same way, he could be accused of forging the brown paper.

WILLES J.—I am entirely of the same opinion. I agree in the definition of forgery at common law, that it is the forging of a false document to represent a genuine document. That does not apply here, and it is quite absurd to suppose that the prisoner was guilty of 10,000 forgeries as soon as he got these wrappers from the printer; and, if he had distributed them over the whole earth and done no more he would have committed no offence. The fraud consists in putting inside the wrappers powder which is not genuine, and selling that. If the prisoner had had 100 genuine wrappers and 100 not genuine, and had put genuine powder into the spurious wrappers and spurious powder into the genuine wrappers he would not have been guilty of forgery. This is not one of the different kinds of instruments which may be made the subject of forgery. It is not made the subject of forgery simply by reason of the assertion of that which is false. In cases like the present the remedy is well known: the prosecutor may, if he pleases, file a bill in equity to restrain the defendant from using the wrapper, or he may bring an action at law for damages, or he may indict him for obtaining money under false pretences; but it would be straining the law to hold that this was a forgery.

BRAMWELL B.—I think that this was not a forgery.

Forgery supposes the possibility of a genuine document, and that the false document is not so good as the genuine document, and that the one is not so efficacious for all purposes as the other. In the present case one of these documents is as good as the other—the one asserts what the other does—the one is as true as the other, but one gets improperly used. But the question is whether the document itself is a false document. It is said that the wrapper is so like one used by somebody else that it may mislead; but that is not material to the question we have to decide. The prisoner may have committed a gross fraud in using the wrappers for that which was not the genuine powder, and may possibly be indicted for obtaining money by false pretences, but I think he cannot be convicted of forgery.

CHANNELL B.—The conviction must be quashed. The prisoner may have rendered himself liable to an indictment for obtaining money by false pretences, but he was not properly convicted of forgery.

BYLES J.—Every forgery is a counterfeit. Here there was no counterfeit. The offence lies in the use of the wrapper.

Conviction quashed.

High Court 158

REGINA v. CHARLES WEST.

1858.

THE following case was reserved and stated by the Deputy Recorder of *Maidstone*.

At the General Quarter Sessions of the Peace for

A fraudulent misrepresentation of an existing matter of fact accompanied

by an executory promise to do something at a future period, as that the prisoner *had* bought certain skins and *would* sell them to the prosecutor, is a false pretence within the statute, although it appears that the promise, as well as such misrepresentation of fact, induced the prosecutor to part with the money.

1858. the borough of *Maidstone*, in the county of *Kent*,
 holden at *Maidstone* on the 6th day of *January*,
 1858, *Charles West* was tried upon the following
 indictment.

WEST'S
Case.

Borough of *Maidstone* } The jurors for our lady the
 in the county of *Kent* } Queen upon their oath pre-
 to wit. } sent that *Charles West* on the

eighth day of *December* in the year of our Lord one
 thousand eight hundred and fifty seven unlawfully
 knowingly and designedly did falsely pretend to one
Harriet Wright that he the said *Charles West* had
 bought thirty sheep skins two bullock skins and two
 horse's hides at Mr. *Bennett's Paddock Wood* that he
 the said *Charles West* had paid ten shillings on the
 said skins and hides and that he wanted four pounds
 ten shillings to enable him to fetch them by the
 railway that he would bring the said skins and hides
 to the said *Harriet Wright* and sell them to her that
 they were worth between eight and nine pounds and
 that Mr. *Bennett* kept a pack of hounds and was a
 gentleman farmer and lived about half a mile from
Paddock Wood by means of which said false pre-
 tence the said *Charles West* did then unlawfully
 obtain from the said *Harriet Wright* certain money
 of and belonging to the said *Harriet Wright* with
 intent to defraud, whereas in truth and in fact the
 said *Charles West* had not bought thirty sheep skins
 two bullock skins and two horse's hides at Mr.
Bennett's at *Paddock Wood* and whereas in truth
 and in fact the said *Charles West* had not paid ten
 shillings on the said skins and hides and whereas in
 truth and in fact the said *Charles West* did not want
 four pounds ten shillings to enable him to fetch the
 said skins and hides by the railway and whereas in
 truth and in fact the said *Charles West* had not any
 skins and hides worth between eight and nine pounds

to sell to the said *Harriet Wright* and whereas in truth and in fact there was no such person as Mr. *Bennett* who kept a pack of hounds and was a gentleman farmer living about half a mile from *Paddock Wood* as he the said *Charles West* well knew at the time he did so falsely pretend as aforesaid, against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

1858.

 WEST'S
Case.

The evidence, so far as it was material to the present case, was as follows:—

Harriet Wright.—I keep a marine shop in *High Street, Maidstone*. The prisoner came to my shop about four o'clock in the afternoon of the seventh of *December* instant. I had known him some little, but very little before. He said he had been to *Paddock Wood* to a Mr. *Bennett's*, and that he had bought thirty sheep skins, two bullock's hides, and two horse's hides, and loaded them upon a waggon to carry to *Paddock Wood* station, and that he had paid ten shillings upon them to make them safe. He said Mr. *Bennett* was a gentleman farmer and kept a pack of hounds, and that he lived half a mile from *Paddock Wood* Station; he asked me for four pounds ten shillings; he said he was to give seven pounds for the skins, and that he would bring them and sell them to me, and asked me for four pounds ten shillings in part payment of them. I told him it was a deal of skins for one man to have, and he replied it was a bye place, and no buyer of skins had been there for a twelvemonth. I refused to let him have the money; he said he hoped I would consider it, and that he was going for the skins the next morning by the nine o'clock train, and that he would call upon me in the morning. The next morning he came to me about eight o'clock, and said it would be a great

1858. loss if I did not let him have the money, and that it

WEST'S would not make much difference whether I paid for
Case. them at eight o'clock in the morning or at three in
the afternoon. I believed his story or I should not
have let him have the money. I then consented to
let him have the four pounds ten shillings, and my
daughter paid it to him by my directions. The repre-
sentation that he had bought the skins induced me to
let him have the money. The same day I saw the
prisoner about three o'clock in the stock market, I
asked him if he had got back; he replied that he had
not been—that he had missed the train. I said he
had better give me my money back. He said it was
at home. I said, I will go home with you for it. He
replied that he had spent some of it. I said, you have
got that money under false pretences. He replied
that he was going for the skins the following morning.
I told him I did not believe he had any to fetch, and
that he was swindling me out of the money. He then
said he would bring it down between five and six
o'clock, but I saw no more of him. He has brought
skins to me before and I have sold them. I expected
to make a profit by the skins, and I lent the prisoner
the money because I thought he would bring me the
skins, and I would not have lent him the money if I
had not believed that he was going to *Paddock Wood*
to bring me the skins. If he had only told me that
he had bought skins at *Paddock Wood*, unless I had
thought he would sell them to me I would not have
let him have the money; nor should I have lent him
the money if I had not thought that he had already
bought the skins of Mr. *Bennett*.

Mary Wright, the daughter of the last witness,
corroborated her mother's evidence.

Samuel Wagborne, a police constable of *Brenchly*
parish in which the *Paddock Wood* Station is situated,

knows the whole of the farmers. There is no farmer or gentleman of the name of *Bennett* in the neighbourhood, and is sure he should have known if there had been a person of that name.

1858.

 WEST'S
Case.

I directed the jury, if they believed the facts stated on the part of the prosecution, to find a special verdict, and they found the prisoner "guilty of obtaining the sum of four pounds ten shillings upon the false pretences that he had purchased the skins from Mr. *Bennett* and would bring them to the prosecutrix and sell them to her."

As I entertained some doubts whether the false pretence which appeared to be the real inducement to advance the money, videlicet, the future selling of the skins to the prosecutrix, was within the statute I postponed judgment until the next Sessions; discharged the prisoner on recognizances of bail to appear and receive judgment; and reserved the case for the opinion of the Court of Criminal Appeal upon the following question:

Whether the pretence used, and which induced the prosecutrix to advance the money, was a sufficient false pretence within the statute?

James Espinasse,
Deputy Recorder.

This case was argued on the 1st *May* 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

F. Russell appeared for the Crown, and *C. G. Addison* for the prisoner.

C. G. Addison, for the prisoner. I submit that the prosecutrix did not part with her money upon any false pretence within the statute. There were two representations, one of an existing fact and the other a promise to be fulfilled at a future time. These two

1858.

WEST'S
Case.

pretences are either separable or inseparable. Supposing that the misrepresentation of the fact, that the prisoner had bought the skins, is separable from the promise to sell them to the prosecutrix, then the evidence shows that she did not part with her money on that pretence only, for she expressly says "that if the prisoner had only told her that he had bought the skins at *Paddock Wood*, unless she had thought he would sell them to her she would not have let him have the money."

But supposing the pretences are inseparable, and I submit that they are, then part of the pretence being bad the whole is bad, and the conviction cannot be sustained.

POLLOCK C. B.—Take the case of a man borrowing money. He says I want it to buy a Commission in the Army, and when I have bought it I will employ you, and I have here a letter from a person in authority, telling me that if I pay the deposit tomorrow I shall have the commission. The pretence as to the letter is false; but it may be that the lender would not part with his money without the promise of future employment, or without the expectation of being repaid.

Addison. In cases of loan there is always an expectation that the money will be returned (*a*). This case is on the boundary line between civil and criminal liability, and is an attempt to make that a criminal offence which is substantially only a breach of a civil contract. The real pretence was that the prisoner would go and get the skins and sell them to the prosecutrix—a mere executory promise. If this conviction is upheld there will be frequent indictments for breach of contract.

POLLOCK C. B.—I go a very long way with you as

(*a*) See *Regina v. Burgon*, *antè*, p. 20, as to loan obtained by false pretences.

to contracts, and I think there would be great mischief in encouraging parties to make breaches of contract the subject-matter of an indictment; but there are cases in which no contract is really intended.

Addison. The statute upon which this indictment is founded, the 7 & 8 *Geo.* 4. c. 29., is not directed against false representations of a man's intentions. The decision in *Rex v. Perrott* (a) shows that the pretence must relate to some existing fact and constitute a knowing lie, and other cases establish that it must refer to something extraneous to the mind or will of the party; and that a pretence that a man will do an act he does not mean to do, is not a false pretence within the statute. In *Rex v. Goodhall* (b), the prisoner pretended that if the prosecutor would send to the prisoner's house the carcasses of three sheep and two legs of veal, the prisoner would pay for them on delivery, and send back the money by the person who brought them. The prisoner received the meat but sent no money, and the jury found that he never intended to send the money but meant to cheat the prosecutor out of his meat, and the prisoner was convicted. It was held the conviction was wrong, as the pretence amounted merely to a promise for future conduct, and was not a false pretence within the statute then in force.

1858.

 WEST'S
Case.

WIGHTMAN J.—It will not be disputed that a pretence of this sort is not within the statute; but have you any case where there was a pretence of an existing fact combined with a promise for future conduct, the pretence here being that the prisoner *had bought* the skins and *would bring* them to the prosecutrix?

Addison. In *Rex v. Douglas* (c) the pretence was that the prisoner *knew* where some lost geldings were

(a) 2 Maule & Sel. 379.

(b) Russ. & Ry. 461.

(c) 1 Moo. C. C. 462.

1858.

 WEST'S
 Case.

to be found, and that he *would tell* the prosecutor where they were if he would give him a sovereign down, and the prisoner having got the money refused to tell, and was found guilty of obtaining money by false pretences; but it was held that the conviction could not be sustained.

POLLOCK C. B.—Are you aware of the case of *Regina v. Fry (a)*, decided upon precisely the same point, where you succeeded for the prosecution? Can you distinguish that case from this?

Addison. That case was not argued, and I think it is distinguishable. That was a loan necessarily involving something to be done in future, and ranges amongst that class of cases where the representation was of an existing fact relating to a future event, such as *Young and Others v. The King (b)*, where the pretence was that *Young had made* a bet that *Lewis would run* a race the next day, when the substance of the pretence was the existing fact of the bet, and not the accomplishment of the future transaction. In *Regina v. Fry* the substance of the pretence was that the prisoner kept a shop on *Northumberland Heath*. There was a false assumption of character and position, by means whereof a loan was obtained. No doubt part of the inducement for the lending of the money was an expectation on the part of the prosecutrix that she was to have her money back again; but that expectation exists wherever money is lent. It formed no part of the real pretence. In *Regina v. Johnston (c)* there was the combined effect of a misrepresentation of an existing fact and of a promise for future conduct. Part of the pretence there was that the prisoner *had purchased* a wedding suit, and wanted the money to pay for it, and that he *would marry* the prosecutrix on

(a) *Antè*, p. 449.

(b) 3 T. R. 98.

(c) 2 Moo. C. C. 254.

the 8th *February*. Also that his master *had promised* to lend him a cart to fetch furniture, and that he *would go* to *Newcastle* and buy furniture; but it was held that the conviction could not be supported, as the substance of the pretence was a promise for future conduct.

1858.

 WEST'S
Case.

WIGHTMAN J.—But what did the jury there find? Here, there is a special finding that the prosecutrix parted with her money from the combined effect of the representation of the fact that the prisoner had actually bought the skins, and the promise to bring them and sell them to her.

Addison. In *Regina v. Wickham* (a) it was held that if two false pretences are so connected together one cannot be separated from the other, and that if the jury find a general verdict of guilty, and it afterwards appears that one of them is not a sufficient false pretence within the statute, the verdict cannot be supported. There the pretences were that the defendant was a captain in the *East India Company's* service, and that a promissory note passed by him was a good and genuine note, without any averment that he knew the note not to be good; and Lord *Denman* says, “One pretence might have been unavailing without the other.”

BRAMWELL B.—What Lord *Denman* says there appears at first sight very much in your favour. But let me ask you, if the jury had found that the money had been obtained by means of the false pretence of being a captain &c., would the conviction have been sustainable?

Addison. Yes.

BRAMWELL B.—Then the case is not an authority in point.

Addison. In the *American Courts* these cases of

1858.

WEST'S
Case.

false pretences have been much considered, and the mischief of punishing breaches of contract as crimes pointed out. In *The Commonwealth v. Hutchinson* (a), King J. says:—"Although in ethics every misrepresentation is morally wrong, yet if so severe a standard of conduct is to be introduced into our criminal code a breach of contract and a crime will scarcely be divided by an appreciable line, and criminal tribunals will hereafter be employed in punishing infamously acts which have heretofore been understood as only creating civil liabilities. Such a rule might in some instances justly chastise a bad man, but it could not fail to be terribly abused by exasperated or reckless creditors smarting under losses and stimulated by the fierce spirit of revenge." In *Commonwealth v. Drew* (b) it is laid down in reference to an *American* enactment, founded on our statute law, that the pretence must relate to past events, and that any representation or assurance in relation to a future transaction may be a promise or covenant creating a civil liability, but is not a false pretence punishable by criminal prosecution. And in *Wharton's American Criminal Law*, p. 727, it is clearly laid down that a man is not punishable under these statutes for his future intentions, or for saying that he will do an act which he does not mean to do. This is really nothing more than a breach of a contract to sell the skins to the prosecutrix.

F. Russell, for the Crown, was stopped by the Court.

POLLOCK C. B.—We are all of opinion that it is impossible to distinguish this case from *Regina v. Fry* (c), in which it was decided that when a misrepresentation of a matter of fact is accompanied by a

(a) 2 Parsons, 309; Wharton's Amer. Crim. Law, 719, 3rd ed.

(b) 19 Pick. Amer. Rep. 185.

(c) *Antè*, p. 449.

promise, the promise does not prevent the case from coming within the statute. In that case the jury found that the prosecutrix parted with her money under the belief that the prisoner kept a shop on *Northumberland Heath*, and that she, the prosecutrix, would have the money back when she went home with her. Part of the inducement to the prosecutrix was the expectation that she would be repaid the money when she went home with the prisoner, and that expectation was grounded on the belief that the prisoner kept a shop on *Northumberland Heath*. We cannot distinguish that case from the present, and the conviction must be affirmed.

1858.

WEST'S
Case.

Conviction affirmed.

REGINA v. THOMAS FRAMPTON.

1858.

THE following case was reserved and stated by the Deputy Chairman of the *Dorset* County Sessions.

At the General Quarter Sessions of the Peace for the county of *Dorset*, held at *Dorchester* on the 5th of *January* 1858, the prisoner *Thomas Frampton* was tried with two other prisoners, named *James Wilkinson* and *James Tavender*, before myself and other justices, upon the following indictment:—

Dorsetshire } The jurors for our Sovereign lady the
to wit. } Queen upon their oath present that
James Wilkinson and *James Tavender* on the twenty

The prisoner was found guilty of receiving goods knowing them to have been stolen. The prisoner was tried with *B. and C.*, who were charged in different counts with embezzling and stealing goods the property of

their master; and the prisoner was charged in the same indictment with the same goods knowing them to have been stolen. The jury found *B.* guilty on the count for embezzlement only and acquitted *C.*, finding the prisoner guilty on the count for receiving. Held, that the conviction of the prisoner was right.

1858.
FRAMPTON'S
Case.

seventh day of *October* in the twenty first year of the reign of our Sovereign lady *Victoria* at the parish of *Beaminster* in the county of *Dorset* aforesaid being then and there employed as servants to one *William Horsey Hebditch* did by virtue of their said employment then and there and whilst they were so employed as aforesaid receive and take into their possession certain oats and corn mixture to wit one bushel of oats and two bushels of a certain mixture consisting of cut clover hay and straw for and in the name and on the account of the said *William Horsey Hebditch* their master and the said oats and mixture then and there *fraudulently and feloniously did embezzle*. And so the jurors aforesaid upon their oath aforesaid do say that the said *James Wilkinson* and *James Tavender* then and there in manner and form aforesaid the said oats and mixture the property of the said *William Horsey Hebditch* their master from the said *William Horsey Hebditch* *feloniously did steal take and carry away*, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity.

2nd count. And the jurors aforesaid upon their oath aforesaid do further present that *the said James Wilkinson* and *James Tavender* on the said twenty seventh day of *October* in the twenty first year of the reign aforesaid at the parish of *Beaminster* aforesaid in the county of *Dorset* aforesaid were servants to the said *William Horsey Hebditch* and that the said *James Wilkinson* and *James Tavender* afterwards and whilst they were such servants to the said *William Horsey Hebditch* as aforesaid on the day and in the year aforesaid with force and arms at the parish of *Beaminster* aforesaid in the county of *Dorset* aforesaid one bushel of oats and two bushels of a certain mixture consisting of cut

clover hay and straw of and belonging to the said *William Horsey Hebditch* their master then and there being found then and there feloniously did steal take and carry away, against the form of the statute in such case made and provided and against the peace of our said lady the Queen her Crown and dignity. 1858.

FRAMPTON'S
Case.

3rd count. And the jurors aforesaid upon their oath aforesaid do further present that heretofore to wit at the General Quarter Sessions of the peace of our lady the Queen held at *Dorchester* in and for the county of *Dorset* on *Tuesday* the seventeenth day of *October* in the year one thousand eight hundred and fifty four one *Thomas Frampton* was then and there convicted of felony.

4th count. And the jurors aforesaid upon their oath aforesaid do further present that the said *Thomas Frampton* being so convicted of felony as in the third count of this indictment mentioned afterwards to wit on the said twenty seventh day of *October* in the year one thousand eight hundred and fifty seven at the parish of *Beaminster* in the county of *Dorset* one bushel of oats and two bushels of a certain mixture consisting of cut clover hay and straw of the goods and chattels of the said *William Horsey Hebditch* before then feloniously stolen and carried away feloniously did receive he the said *Thomas Frampton* then well knowing the said goods and chattels to have been feloniously stolen and carried away, against the form of the statute in such case made and provided and against the peace of our lady the Queen her Crown and dignity.

The jury found *Wilkinson* guilty on the first count of the indictment for embezzlement, and acquitted *Tavender* on all the counts, and found the prisoner *Thomas Frampton* guilty under the fourth count of

1858. feloniously receiving. It was objected in arrest of judgment, on behalf of the prisoner *Frampton*, that the jury could not find him guilty of receiving, they not having found the prisoners *Wilkinson* and *Tavender*, or either of them, guilty of stealing. But it is to be observed that the count in question, although the property charged to have been feloniously received is in point of fact the same as that mentioned in the counts for embezzlement and larceny, is nevertheless independent of such counts, being as for a substantive felony.

FRAMPTON'S
Case.

The question which I now most respectfully submit to the consideration of Her Majesty's Justices of either Bench and Barons of the Exchequer is, whether the jury could, under the circumstances, legally find the prisoner *Frampton* guilty of feloniously receiving; the prisoners *Wilkinson* and *Tavender* having been indicted for feloniously stealing and embezzling such property, and the prisoner *Wilkinson* having been found guilty of the embezzlement only.

Execution of the judgment (sentence having been passed upon the prisoner, who is now in prison,) was respited, until the opinion of Her Majesty's Judges shall have been received upon the case.

This case was argued, on the 1st of *May* 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

Porcher appeared for the Crown; no counsel appeared for the prisoner.

Porcher, for the Crown. Section 47 of the statute 7 & 8 *Geo.* 4. c. 29. enacts that if any clerk or servant shall fraudulently embezzle chattels or money received for or in the name or on the account of his master, "every such offender shall be deemed to have felo-

niously stolen the same." The first count on which *Wilkinson* was found guilty, charges him with feloniously embezzling. A conviction on that count is equivalent to a conviction of stealing, and therefore the conviction of the prisoner on the fourth count is properly a conviction of receiving goods which the jury found had been feloniously stolen by *Wilkinson*. In 2 *Russ. on Crimes*, by *Greaves*, page 168, it is said: "This enactment of the 7 & 8 *Geo.* 4. c. 29. s. 47., like the repealed statute of the 39 *Geo.* 3., has the effect, it should seem, of constituting the offence described in it a larceny. It specifies what the circumstances are which shall be sufficient to constitute such offence a larceny, and under which circumstances the offender shall be deemed to have feloniously stolen." The learned counsel also referred to *Rex v. Kingston and others* (a) and *Regina v. Craddock* (b).

1858.
FRAMPTON'S
Case.

POLLOCK C. B.—There is no difference in the opinion of the Court with reference to the meaning of the 47th section of this statute. It is very likely that, there being no statute enacting that it should be an offence to receive goods which had been embezzled, the words of the section which provide that a person who embezzles shall be deemed to have feloniously stolen, were inserted for the purpose of turning all embezzlements into larceny.

Conviction affirmed.

(a) 8 East, 41.

(b) 2 Den. C. C. 31.

1858.

REGINA v. ALFRED FEIST.

The defendant was convicted on an indictment charging him with disposing of certain dead bodies for the purpose of dissection. The defendant, the master of a workhouse, was a person having lawful possession of the bodies of deceased paupers; and under section 7 of the Anatomy Act (2 & 3 Wm. 4. c. 75.) it was lawful for him to permit such bodies to undergo anatomical examination, provided the relatives did not require them to be buried without such examination. For the purpose of preventing the relatives from making this requirement and leading them to suppose that the bodies were buried without dissection, the defendant showed the bodies to the relatives in coffins and caused the appearance of a funeral to be gone through. This fraud prevented the relatives from making the requirement, and the defendant for gain to himself disposed of the bodies for dissection. *Held*, that the statutory requirement not having in fact been made, the defendant was justified in what he did by the seventh section of the Anatomy Act, and that the conviction was wrong.

THE following case was reserved by WIGHTMAN J. at the Central Criminal Court.

The defendant was the master of the workhouse at *Newington*, and was indicted for disposing of the dead bodies of some of the paupers who died in the workhouse, for the purpose of dissection, and for gain and profit to himself. It appeared by the evidence that the defendant, who was the master of the workhouse of the parish of *St. Mary's Newington*, had, in collusion with *Robert Hogg*, who was the parish undertaker, upon the death of several of the paupers, caused their bodies to be shown to their relatives in coffins and every appearance of regular funerals to be gone through, and the relatives followed to the cemetery what they supposed to be the body of the deceased, when in reality just before the funeral left the workhouse other coffins were substituted for those which the relatives had seen, and the bodies were in the evening taken to *Guy's Hospital* for dissection, all the necessary formalities required by the 2 & 3 Wm. 4. c. 75., for regulating schools of anatomy, having been duly complied with. In no case did the relatives of the deceased persons in terms require that these bodies should be interred without anatomical examination; and, indeed, they appear to have believed

that the bodies were buried without any such examination. It did not appear that the defendant made any regular charge to the hospital or the surgeons in respect of the bodies supplied to them from the workhouse; but that in the year 1856 he received 19*l.* 10*s.*, and in 1857 26*l.* from *Guy's Hospital*, as gratuities for his trouble in going through the formalities and giving the notices and obtaining the certificates, in respect of each of the bodies, required by the Anatomy Act, and the amount paid to him was in proportion to the number of bodies supplied. These payments were in contravention of the 7 & 8 *Vict.* c. 101. s. 31. (a). Upon this state of facts the jury found that the defendant caused the dead bodies of four paupers to be delivered to *Hogg*, and delayed the burial of them for an unreasonable length of time, in order that they might be dissected in the meantime, and that he did so for gain and profit for himself. They also found that he caused the appearance of a funeral of such paupers deceased to be gone through, with a view to prevent their relatives requiring the bodies to be interred without being subject to anatomical examination, and that, but for such supposed funeral, the relatives of the deceased would have required their bodies to be interred without anatomical examination. It was objected by the counsel for the defendant that he, having lawful possession of the bodies as master of the workhouse, might lawfully do that which he had done, as no relative of the deceased persons had required the bodies to be interred without undergoing anatomical examination. Upon the finding of the jury, however, I directed a verdict of guilty to be entered upon the 5th, 6th, 7th and 8th counts of the indictment, subject to the opinion of this Court

1858.

 FEIST'S
Case.

(a) See the judgment of WILLES J., *post*, p. 599.

1858. whether the verdict, so entered upon all or any of
FEIST'S these counts, is warranted by the before mentioned
Case. evidence and finding of the jury.

W. WIGHTMAN.

There were sixty-four counts in the indictment. The following is an abstract of the counts upon which the defendant was found guilty.

The 5th count charged, that the defendant, for lucre and gain, took away a dead body with intent to delay the burial for an unreasonable time; and that it might be dissected without lawful authority.

The 6th count charged, that the defendant, for lucre and gain, took away and removed a dead body with intent to sell and dispose of the same for the purpose of dissection without lawful authority.

The 7th count charged, that a dead body was in the custody of the guardians for the purpose of burial, and that the defendant stole it from their custody for the purpose of dissection.

The 8th count charged, that the defendant sold and disposed of a dead body for gain and profit.

This case was argued on the 24th *April* 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

B. C. Robinson appeared for the Crown, and *H. Matthews* for the prisoner.

Matthews, for the prisoner. This is an indictment at common law, and I contend, first, that the counts on which the prisoner was convicted *do not show any common law offence*; and secondly, that the defendant was justified in what he did by the provisions of the Anatomy Act, 2 & 3 *Wm.* 4. c. 75. First, the counts are bad at common law.

WIGHTMAN J.—The entire question is whether the defendant is protected by the statute (a).

Matthews. The defendant had lawful possession of the body, and section 7 of the statute enacts that “it shall be lawful for any executor or other party having lawful possession of the body of any deceased person, and not being an undertaker or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party such person shall have expressed his desire either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination.”

Section 8 provides for the party lawfully in the possession of a dead body, directing and permitting anatomical examination where the deceased shall during his life have directed it, “unless the deceased person’s surviving husband or wife or nearest known

1858.

 FEIST’S
Case.

(a) Upon this intimation the learned counsel did not proceed with his argument on the question, whether the counts on which the prisoner was convicted disclosed a common law offence. In *Regina v. Sharpe, antè*, p. 160, it was held that it was a common law offence to remove without lawful authority a corpse from a grave in a Dissenters’ burying ground. In delivering judgment ERLE J. said: “The defendant was wrongfully in the burial ground, and wrongfully opened the grave and took out

several corpses and carried away one. We say he did this wrongfully, that is to say, by trespass.” The earlier cases shew that it is an indictable offence to take up a dead body even for the purpose of dissection (see the cases mentioned, *antè*, p. 163, note (a)); but the question to be discussed in this case, if the argument had proceeded, would have been whether a person lawfully in possession of a dead body would commit a common law offence by disposing of it for the purpose of dissection.

1858.

FEIST'S
Case.

relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination"; and, looking at the two sections, it is obvious that unless the relatives interfere and forbid an anatomical examination, the person lawfully possessed of the body may allow it; it does not become an offence unless it is done in spite of the desire of the relatives, expressed by their making the requirement mentioned in the statute. The intention of the statute is, that the relatives shall actively interfere, and if they do not so interfere the body may lawfully be dissected.

POLLOCK C. B.—The defendant acted a lie to prevent the requirement being made, but that is not the offence with which he is charged, and the dissection in itself was perfectly legal.

BRAMWELL B.—Does not the statute assume that the relatives shall have an opportunity of requiring that the body shall be interred without dissection? Perhaps you say that there was a time when there was no fraud in operation, and that there was then an opportunity of objecting to the body being dissected.

Matthews. There was abundant opportunity for the relatives to make the requirement if they had chosen so to do. The case finds that they did not require, and although the jury found that but for the trick resorted to the relatives would have made the requirement, still, as they did not, in fact make it, the conviction of the prisoner cannot be sustained.

The Court called upon

B. C. Robinson, for the Crown. But for the statute it is a common law offence to sell a dead body for the purpose of dissection. There are many cases which show that it is so.

POLLOCK C. B.—The foundation of the decisions to

which you refer is, that it is an offence to withdraw a body from burial, not that there was anything wrong in dissection (*a*).

1858.

FEIST'S
Case.

B. C. Robinson. The 5th count charges the intent of the defendant to be to delay the burial for an unreasonable time; and a refusal or neglect to bury, or a delay in burying a dead body, is a misdemeanor (*b*). But there was in fact a requirement by the relatives that the body should be buried. The body was shown to them, and they followed to the grave what they believed to be the same body, and that was a requirement on the part of the relatives that the body should be buried. There was no necessity that the requirement should be in writing or in words; it was sufficient that they indicated by their act what they required. This they did; their following the supposed body is an act inconsistent with dissection.

POLLOCK C. B.—Then the indictment should have been for permitting dissection notwithstanding the requirement.

B. C. Robinson. Without the aid of the statute the defendant was guilty of an offence at common law, and if he seeks to justify under the statute, it is for him to bring himself within it. The onus is entirely upon him. I submit that we have proved affirmatively that there was a requirement; but at all events the defendant has not proved the negative—that there was not.

(*a*) See *anté*, p. 593, note (*a*).

(*b*) It was not charged in this case that any duty to bury lay upon the prisoner, or that any temporal inconvenience arose, as a nuisance, from the neglect of interment. See *Andrews v. Cawthorne*, Willes, 537, note (*a*); *Rex v. Young and*

Others, cited in *Rex v. Lynn*, 2 T. R. 734; *Quick v. Coppleton*, 1 Lev. 161; 1 Sid. 242; 1 Keb. 86 b.; *Jones v. Ashburnham*, 4 East, 460; *Rex v. Cheere*, 4 B. & C. 902; S. C. 7 D. & R. 461; *Rex v. How*, 2 Strange, 699; *Regina v. Stewart*, 12 A. & E. 773.

1858.

FEIST'S
Case.

WIGHTMAN J.—The relatives did not in terms require the body to be buried without dissection.

B. C. Robinson. But they did by their acts, and the jury found, that if they did not in terms make the requirement, they would have done so but for the pretended funeral. If they did not in words dissent from the anatomical examination they were prevented from so doing by the fraud of the defendant. In *Regina v. Camplin* (a) the prisoner made a girl drunk, and when she was in a state of insensibility he violated her; and it was held a rape, although the crime of rape is not committed unless it be against consent. “Here,” said *Alderson B.*, resistance “was rendered impossible by the liquor which the prisoner administered.” So in this case the requirement was prevented by the act of the defendant, who cannot take advantage of his own fraud.

Matthews was not called upon to reply.

POLLOCK C. B.—We are all of opinion that this conviction cannot be sustained, and the ground on which I believe we all proceed is, that what was done by the defendant was done according to law. He had legal possession of the body, and he did with it that which the law authorized him to do. It may be that he prevented the relatives from requiring the body to be interred without undergoing an anatomical examination by acting a lie; but if that was wrong in the eye of the law, he should have been prosecuted for that wrong. It may be that he was guilty of a conspiracy with the undertaker to prevent the requirement being made, and if so he should have been prosecuted for that conspiracy. I am now speaking my own opinion, but I do not think it a convenient mode of administering the criminal law

(a) 1 Den. C. C. 89.

to impute an offence at common law and then require the defendant to justify his conduct by bringing himself within a particular statute, when in truth his intention was, not to infringe the common law at all, but to infringe that particular statute. It is clear that the defendant did not mean to commit a common law offence at all; and if by acting a lie he prevented the requirement from being made, he should have been prosecuted for that. Suppose he had prevented the requirement being made by giving a bank note to the relatives, and the body had been dissected and afterwards buried, and that it turned out that the note was bad, surely in that case he would not have been guilty of an offence by causing the body to be dissected.

1858.

 FRIST'S
Case.

WIGHTMAN J.—The only question I intended to reserve at the trial was whether the defendant was protected by the 7th section of the Anatomy Act, which makes it lawful for persons who have the lawful custody of a dead body to dispose of it for the purpose of dissection, unless the relatives of the deceased require that it should be buried without dissection. The defendant's answer to the charge is, "I did dispose of the body for the purpose of dissection, but there was no requirement on the part of the relatives that the body should be interred without it." The reply on the part of the prosecution is, "but you prevented such a requirement by your fraud." The whole question then is, does the fraudulent preventing of what the statute puts as a proviso take away the protection which the law would otherwise give the defendant? I do not think that it does. Then it is said that the defendant is by his own fraud disabled from setting up the absence of a requirement—that he ought not to be allowed to plead his own fraud in his own justification. No doubt, in many cases,

1858.

FEIST'S
Case.

fraud will supply the place of that which may otherwise be required in express terms ; but I think that this is not one of those cases. I do not know whether the defendant would be liable to be proceeded against for the fraud he has actually committed. It is however enough to decide that this conviction cannot be sustained. It is true the jury found that, but for the fraud, the relatives would have required the bodies to be interred without dissection ; but they did not in fact so require. The result of this inquiry will probably be that in future the relatives of deceased paupers will in all cases require the interment to take place without dissection : but they did not do so here, and although they were influenced by the fraud of the defendant, that does not make him liable to be convicted upon this indictment.

WILLES J.—I am of the same opinion. It is clear that at common law it is a misdemeanor to take up a corpse out of a burial ground and sell it even for the purpose of dissection ; but in modern times the requirements of science are larger than formerly, and when they are so extensive it seems to me that we ought not to entertain any prejudice against the obtaining of dead bodies for the laudable purposes of dissection, but we ought rather to look at the matter with a view to utility, and that we should not suffer ourselves to be prejudiced by the unfeeling and indecent nature of the defendant's conduct. Now, the Anatomy Act has altered the common law, and has rendered the selling of a dead body for the purpose of dissection lawful under certain circumstances. It is true, this person was guilty of a trick, but nevertheless he does not come within the exception in the section of the Act. Whether or not an indictment could be framed for this fraud in preventing the requirement it is not for me to say ;

it would be extrajudicial for me to express an opinion upon that; but the very case which here presents itself is provided for by the legislature by section 31 of the 7 & 8 *Vict.* c. 101., which enacts that it shall not be lawful for any officer connected with the relief of the poor to receive any money from any dissecting school or school of anatomy or hospital, or from any person or persons to whom any dead body may be delivered, or to derive any personal emolument whatever for or in respect of the disposal of such body; and every offender on conviction is made liable to a penalty not exceeding 5*l.* We are asked to say that the defendant has been guilty of a misdemeanor at common law, and not of any offence under the Anatomy Act; and, looking at that Act, it seems to me that, in disposing of the dead bodies, he was not guilty of an unlawful act, and that he was not rightly convicted.

BRAMWELL B.—I am of the same opinion. I assume that, except for the statute, this indictment would be good at common law. Then, is the defendant protected by the statute? He was justified by the statute in what he did, unless some relative required the body to be buried without dissection. Mr. *Robinson* admits that none of the relatives did this in terms, and that in fact the idea of dissection never entered their minds; but he contends that their conduct with respect to the burial, and the defendant's fraud in concealing the intention to dissect, are equivalent to a requirement; but this is not so. I think the Act means that there must be an affirmative requirement. The only doubt I have had has been this—the Act seems to mean that the relatives shall have an opportunity of requiring, and for this purpose they must have a reasonable time to do so; and I have had a doubt whether this reasonable time had been afforded

1858.

 FEIST'S
Case.

1858.

FEIST'S
Case.

them ; but I think it had : a reasonable time could not be longer than that which ought to intervene between the death and the burial. The relatives had the whole of this period to make the requirement, and during a portion of this time there had been no fraud. The truth is ; a wrong has been done to the relatives by the concealing from them by fraud what they ought to have been made acquainted with. It may be that this would afford a cause of action, but I cannot think that it forms a ground for this indictment.

BYLES J.—I agree with the rest of the Court.

Conviction quashed.

1858.

REGINA v. SAMUEL WALKER.

The prisoner was convicted of embezzlement. The prosecutors, who were manure manufacturers, engaged the prisoner, who kept a refreshment

THE following case was reserved and stated by BRAMWELL B.

The prisoner was convicted before me at the last *Cheshire* Assizes of embezzlement, and sentenced to a year's imprisonment with hard labour. The case was made out if the prisoner was shown to have been a servant within the statute. On this point the evidence

house at B., to get orders which they supplied from their stores. The prisoner was to collect the money and pay it at once to them and send a weekly account ; and was called agent for the B. district. He was to go through the county, see the farmers and get orders, and to be continually during the season among the farmers. Subsequently the prosecutors sent large quantities of manure to stores at B. which were under the control of the prisoner, who took them in his own name and paid the rent to the owner, but was repaid such rent by the prosecutors when the accounts were adjusted. The prisoner supplied the manure from these stores ; but it did not appear that the former mode of supply might not have been resorted to if found convenient. The prisoner signed a proposal to a guarantee society to insure the prosecutors, which stated his salary was 1*l.* per annum, besides commission which was estimated at 6*5**l.* per annum, and it was proved that the prosecutors had agreed to give the salary of 1*l.* per annum. Having appropriated money received from customers, the prisoner fraudulently returned their names as the names of persons who had not paid.

Held, that the conviction was wrong, as the evidence did not establish that the prisoner was servant to the prosecutors within the meaning of the statute.

was as follows:—The prosecutors were manure manufacturers. The prisoner kept a refreshment house at *Birkenhead*, and the prosecutors, while he was so doing, engaged him to get orders for the manure, on which orders they supplied it from the stores. The prisoner was to collect the money and pay it at once to them: he was also to send them weekly accounts, showing what he had sold and what he had received. He was to be paid by a commission. It did not appear that he had undertaken to give any definite quantity of time or labour to the business, but he was to act in a particular district, and in the printed forms given to him on which to make his returns, he was called agent for the *Birkenhead* district. The evidence of the prosecutor was: “he was to go through the county and see the farmers and get orders. He was to be continually during the season among the farmers.” The following alteration took place in the mode of dealing, viz., from the 1st *August* 1856 to *October* 9th 1857, in place of the prosecutors supplying customers on the prisoner’s orders, they sent large quantities of manure to stores at *Birkenhead* (a) of which they paid the rent: these stores were under the prisoner’s control, and from them he supplied the customers whose orders he obtained. This mode of transacting the business partly existed before, and it did not appear but what the first mode or the mixed mode might have been resorted to by the prosecutors, if they found it convenient. The relations between the parties, evidenced as above, continued for some time, when the following took place:—A proposal was made to a guarantee society to insure the prosecutors in respect of their connexion with the

1858.

WALKER’S
Case.

(a) It was arranged during the argument that this part of the case should be considered as amended in the way stated in the marginal note.

1858. prisoner. This proposal was signed by him. It was
 WALKER'S in a printed form, issued by the society, and con-
 Case. tained a notice that some amount of salary must be payable, or the society would not insure. The proposal, signed by the prisoner, stated that his salary was 1*l.* a year besides commission, which was stated to be estimated at 65*l.* per annum. The prosecutor swore that at this time he agreed to give the prisoner a salary of 1*l.* a year. The prisoner was allowed to get in arrear, that is to say, he retained in his hands money he acknowledged he had received, and was treated by the prosecutors as a debtor in respect of it. The alleged embezzlement consisted in this, that he fraudulently returned the names of three persons as having had manure without paying for it, when in fact he had received the sums from them. I left to the jury the question whether or no he was a servant within the statute. But entertaining doubts whether there was any evidence that he was, or whether the question was not for me, and if so, whether I ought not to have decided in the prisoner's favour, I have to request the opinion of the Court of Criminal Appeal thereon

G. BRAMWELL.

This case was argued on the 27th *April* 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

Hardinge Giffard (*Horatio Lloyd* with him) appeared for the Crown, and *M'Intyre* for the prisoner.

M'Intyre, for the prisoner. I submit that the prisoner was not a servant within the meaning of the statute. The evidence rather shows that he was a factor. To have been a servant, the prisoner must have been bound to obey the commands of his employers, which he clearly was not.

The prisoner took the stores, and although he was afterwards reimbursed by the prosecutors, the stores were under his control, and from those stores he supplied the goods.

1858.
WALKER'S
Case.

The goods were supplied to him by the prosecutors with whom he opened an account, and he supplied those goods to whom he liked. He was not bound to give any definite amount of time or labour; nor was he bound, as a servant is, to obey any particular order. He had other business of his own to attend to, and throughout the whole matter he was treated as an agent and not as a servant.

WILLES J. referred to *Regina v. Bailey* (a).

M'Intyre. That case was not argued for the prisoner, and in *Regina v. Goodbody* (b) *Parke* B. said he was of opinion that a man could not be the servant of several persons at the same time, but was rather in the character of an agent; and, referring to *Rex v. Carr* (c), in which a contrary doctrine had been held, his Lordship said he wished to have that question further considered by the Judges.

The salary of 1*l.* a year was merely a colourable thing in order to get security from the guarantee society. It is the case of a commission agent, and the prisoner is styled an agent and treated as a debtor and not as a servant.

Hardinge Giffard, for the Crown. In one sense no doubt the prisoner was an agent, but he was also a servant within the meaning of the statute. It is not necessary, to constitute a man a servant, that he should be under an obligation to obey every lawful command of the master.

POLLOCK C. B.—As, to clean his boots.

Giffard. The prisoner's duty was to collect orders,

(a) *Antè*, p. 121.

(b) 8 Car. & P. 665.

(c) Russ. & Ry. 198.

1858.

WALKER'S
Case.

receive money, and pay the money over at once to the prosecutors.

WIGHTMAN J.—Every factor does that.

Giffard. Every factor may, but he is not compelled to do so.

WIGHTMAN J.—Was the prisoner bound to get orders?

Giffard. Perhaps not; but in *Rex v. Carr (a)* a person employed upon commission to travel for orders and collect debts was held to be a clerk within the 39 Geo. 3. c. 85., although he was employed by many different houses on each journey, and paid his own expences out of his commission, and did not live with any of his employers, nor act in any of their counting houses.

WIGHTMAN J.—Suppose a publican employed for purposes of this kind, would he be a servant?

Giffard. He might or might not according to the facts. The mode of remuneration, whether by salary or otherwise, is no test, *Regina v. Wortley (b)*; no exact line can be drawn and no inflexible rule can be laid down; each case must depend on its own facts.

The case of a commercial traveller is similar to this; such a traveller has been held to be a servant within the statute, and the duties of the prisoner are not distinguishable from his. He, like the prisoner, is employed to obtain orders, and is bound to furnish accounts.

BYLES J.—So is a factor; the law implies that contract for him.

POLLOCK C. B.—What is the difference between a servant and an agent?

Giffard. Every servant is an agent although every agent may not be a servant. The parties were at

(a) Russ. & Ry. 198; see n. (a); 667.

Regina v. Goodbody, 8 Car. & P. (b) 2 Den. C. C. 333.

1858.

WALKER'S
Case.

liberty to contract that the relation of master and servant should exist between them, and they did so contract. By the alteration made in the terms between the prosecutors and the prisoner a new contract was created, and a salary was agreed upon.

WIGHTMAN J.—The salary was obviously only for the purpose of getting the insurance effected.

Giffard. Nor was it necessary in order to create the relation of master and servant. In *Rex v. Ward* (a) it was held that an extra collector of poor rates, whose remuneration was paid out of the parish fund by a per centage on his collections, was a servant or clerk within the meaning of the statute 39 *Geo.* 3. c. 85.; and *Regina v. Callahan* (b) also shows that a narrow construction must not be put upon the words “clerk or servant.”

The question is whether it was impossible to say, upon this evidence, that the prisoner was a servant. Unless it was, the conviction must be supported; for the question was left by the Judge on the trial to the jury, and they found that the prisoner was a servant. The objection, that he could not be servant to more than one person, is answered by the decision in *Regina v. Bailey* (c).

M'Intyre, in reply. In *Regina v. Wortley* there was a direct and distinct contract to serve “as bailiff,” and that case is therefore entirely distinguishable from the present.

The great distinction between this case and all the cases cited is, that the prisoner had the entire authority over the goods, which were under his control, and this makes him a factor and not a servant.

Cur. adv. vult.

(a) 8 Car. & P. 154.

(b) Gow. N. P. Cas. 168.

(c) *Anti*, p. 121.

1858. The judgment of the Court was delivered, on the 1st May 1858, by

WALKER'S
Case.

POLLOCK C. B.—We are of opinion that the evidence in this case did not establish that the prisoner was the servant of the prosecutor, and that the relation shown to have existed between them was rather that of principal and agent. We therefore think this conviction must be quashed.

Conviction quashed.

1858.

REGINA v. WALTER HOOK.

The prisoner was convicted of perjury.

The prisoner, who was a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore on the hearing that he knew nothing of the matter

THE following case was reserved and stated by BRAMWELL B.

The prisoner was convicted of perjury before me at the last assizes at *Chester*. He was a policeman, and laid an information against a publican for keeping open his house after lawful hours on the Fast Day. When called as a witness, on the hearing of the information, he swore he knew nothing of the matter, except what he had been told by another person, and that “*he did not see any person leave the defendant’s house after eleven*” on the night in question. Perjury was proved that the prisoner when laying the information said that he had seen four men leave the house after 11, and that he could swear to one as *W*. It was also proved that on two other occasions the prisoner made a similar statement to two other witnesses; that *W*. and others did in fact leave the house after 11 o’clock on the night in question; that on the hearing the prisoner acknowledged that he had offered to smash the case for 30s.; that he had talked in the presence of another witness of making the publican give him money to settle it; that he had in fact offered to the publican to settle it for 1l.; and had said that he had received 10s. to smash the case and was to have 10s. more.

Held, that the evidence was sufficient to prove the perjury assigned, and that the conviction was right.

assigned on this last allegation. It was material to show it was false; the following evidence was given. The clerk to the magistrates, who took the information, proved that the prisoner, on laying it, said he had caught the publican; he (the prisoner) had last night seen four men leave his house after eleven; that one of them he could swear to; it was *Williamson*; he knew him by his coat. It was further proved, by another witness, that the prisoner, on another occasion, made the same statement to him, the witness, viz., that he had seen four persons leave the house after eleven that night; to one of whom he could swear; it was *Williamson*; he knew him by his coat. It was further proved, by a third witness named *Williamson*, that, on a third occasion, the defendant repeated this statement, with the variation "one I can swear to; it was your brother; I know him by his coat." It was proved that *Williamson* and others did leave the house on that night in question, after eleven. It was proved also that, at the hearing of the information, the defendant acknowledged that he had offered to smash the case for 30s. It was proved, by another witness, that when he, the defendant, talked of laying the information, he said he should make the publican give him money to settle it; a third witness proved that he heard the defendant offer to the publican to settle it for 1*l.*, saying he was risking perjury; and a fourth proved that the defendant owned he had received 10s. to smash the case, and was to have 10s. more. It was objected there was no evidence to go to the jury; that the only witness against the prisoner was himself; and that there was no evidence to show his unsworn statements were not false. The prisoner was convicted, and sentenced to one year's imprisonment and hard labour; but, doubts having been expressed on the

1858.

Hook's
Case.

1858. case, I have to request the opinion of the Court of
 Criminal Appeal thereon.

HOOK'S
 Case.

G. BRAMWELL.

This case was argued on the 24th *April*, 1858, before POLLOCK C. B., WIGHTMAN J., WILLES J., BRAMWELL B. and BYLES J.

H. Lloyd appeared for the Crown, and *M'Intyre* for the prisoner.

M'Intyre, for the prisoner. It is clearly established that to support a conviction for perjury the falsity of the oath must be proved directly by two witnesses at least; or there must be one witness and strong corroborative evidence to confirm him. The rule, that one witness is not sufficient because there would be only one oath against another, is laid down in *Regina v. Muscot (a)*, in which *Parker C. J.* said: "To convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant; for else there is only oath against oath." This rule has been confirmed and acted upon in subsequent cases; and, although it has been held that one witness and corroborative evidence will do, *Coleridge J.*, in *Champney's Case (b)*, said: "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed Lord *Tenterden C. J.* was of opinion that two witnesses were *necessary* to a conviction." The same learned Judge, speaking of this rule in *Regina v. Yates (c)*, said: "The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a mere technical rule, but a rule founded on substantial justice; and evidence

(a) 10 Mod. 193.

(b) 2 Lew. 258.

(c) 1 C. & Mars. 132.

1858.

Hook's
Case.

confirmatory of that one witness in some slight particulars only is not sufficient to warrant a conviction." The rule of law as to this is the same in *Scotland* as in this country. In *Allison's Criminal Law of Scotland*, 481, it is said: "A party cannot be convicted of perjury upon the evidence merely of persons or subsequent declarations emitted by him inconsistent with what he has sworn; because *in dubio* it must be presumed that what was said under the sanction of an oath was the truth, and the other an error or falsehood." The perjury assigned in this case is that the prisoner falsely swore "that he did not see any person leave the defendant's house after eleven:" but, although it was proved that persons did leave the house after eleven, there is no evidence beyond the prisoner's own statement, when he was not upon his oath, that he saw any person leave, or that the statement he made when upon oath was false. Not only is there no oath that he did see, but none that he was there and could have seen. Here, there is the prisoner's statement not upon oath against his statement on oath; and in *Rex v. Harris (a)* an indictment for perjury was held bad which only alleged that the prisoner had given evidence in the House of Lords directly contrary to that which he had given before the House of Commons. The prisoner's evidence on the hearing really amounts to this, that he knew nothing beyond what was told him by some other person, and the facts proved against him are consistent with his evidence on oath being true, and his statements not on oath being false.

H. Lloyd, for the Crown. In *Regina v. Wheatland (b)* it was held that, where a prisoner has, previously to the oath on which perjury is assigned, sworn the contrary on the same matter, proof of the

(a) 5 B. & Ald. 926.

(b) 8 Car. & P. 238.

1858.

Hook's
Case.

previous oath and other confirmatory evidence of its truth is sufficient to convict. Here the prisoner's statements, not upon oath, were equivalent to one witness, and it is shewn by ample evidence that the statement made by the prisoner, when upon his oath, was false, and that his previous statements not upon oath were true. There is in fact an admission, abundantly proved, and that brings this case within the ruling in *Regina v. Wheatland*. In *Rex v. Mayhew (a)* it was held that to prove perjury it is sufficient, if the matter alleged to be falsely sworn be disproved by one witness, if, in addition to the evidence of that witness, there be proof of an account or a letter written by the defendant contradicting his statement on oath.

M. Intyre, in reply. The decision in *Rex v. Mayhew* does not affect this case, because here there is no witness who proves the falsehood of the defendant in the allegation on which the perjury is assigned. There is no evidence to show that the defendant did in fact see, or even that he had the opportunity of seeing, the persons come out of the house.

Cur. adv. vult.

The judgment of the Court was delivered on 1st May 1858.

POLLOCK C. B.—We are all of opinion that this conviction is right. The prisoner swore to a fact, and it was proved by more than one witness that on other occasions he had made statements, not upon oath, inconsistent with the truth of his statement upon oath on which perjury was assigned. It was said in the argument against the conviction that a man could not be convicted of perjury merely by opposing his oath at one time to his oath at another time; and

(a) 6 Car. & P. 315.

1858.

 Hook's
Case.

probably a conviction obtained in that way would not be considered right, unless there were also evidence by which the truth of the two statements might be distinguished—evidence to show that one was true and the other false; but there certainly is a direct authority that such a conviction would be good. In *Rex v. Harris* (a) the defendant was charged with perjury upon a count in which his evidence upon oath before a committee of the House of Commons, and his contradictory evidence before the House of Lords was set out, and the indictment proceeded to say: “and so the jurors aforesaid do say that the said *E. H.* did commit wilful and corrupt perjury;” but there was no averment as to which of these two statements upon oath was false; and the Court of Queen’s Bench held that the count was bad in arrest of judgment. That indictment was, I believe, drawn by my brother CROMPTON from an old precedent; but the Court said it would not do, because it was not sufficient to charge that on one occasion or the other the defendant committed perjury, but you must allege, and the jury must find, on which occasion he did commit it; and that if such a count was held good a person would be twice in peril of the pains of perjury on the same subject-matter. I believe that it was in a recent case held that in an indictment for murder it was not sufficient to allege that the death was caused *either* by burning *or* stabbing the deceased, although it might be quite clear that the death was caused in the one way or the other. I remember discussing that case with *Parke B.*, now Lord *Wensleydale*, and he was of opinion that if one count alleged the death to be by stabbing and another by burning, and six jurymen believed that the death occurred as alleged in one count, and the rest that it

(a) 5 B. & Ald. 926.

9 B. & Ald. 467

1858.

 Hook's
Case.

occurred as alleged in the other, the accused must escape. So in an indictment for perjury, where one oath of the prisoner is opposed to another, it must be stated, and the jury must find, which is the false oath; and all that *Rex v. Harris* decides is that the charge cannot be alleged in an alternative way; but in *Rex v. Knill* (a), arising out of the same transaction, the prisoner was convicted upon counts charging the perjury specifically to have been before the House of Lords, the only evidence being the proof of the two contradictory oaths, and the Court held the evidence sufficient and refused an application by Mr. Jones (afterwards Serjeant *Atcherly*) for a new trial. There is a note in the same case (b) of a precedent, and some observations of *Chambre J.* in his *Precedent Book* (b), which favours the view that, where the perjury assigned is upon one of two oaths, proof of the other oath will be sufficient; and it is there stated that a conviction upon this principle took place at the *Lancaster* Summer Assizes in 1764, in a case tried before *Yates J.* In that case a man had made an information on oath before a justice, that three women were concerned in a riot at his mill, and afterwards at the Sessions he was examined concerning these women, and (having been tampered with in their favour) he then swore that they were not in the riot. There was no evidence on the trial to prove that the women were in fact in the riot (the perjury being assigned on the defendant's oath that they were not); but the defendant's own information on oath being produced and read, whereby he had sworn that they were in the riot, the Judge thought it sufficient to convict him, and he was convicted and transported. After the trial Lord *Mansfield C. J.* and *Wilmot* and *Aston Js.*, to whom *Yates J.* stated the

(a) In note to *Rex v. Harris*, 5 B. & Ald. 929.

(b) *Rex v. Harris*, 5 B. & Ald. 937—940.

reasons of his judgment, concurred in his opinion. Then there is the case of *Regina v. Wheatland* (a), in which this doctrine has been a little varied. There, it being proposed to prove an indictment for perjury assigned on the evidence of the prisoner, on a trial at the Quarter Sessions, merely by the deposition of the prisoner before the committing magistrate, *Gurney B.* directed the jury that proof of the defendant having given contradictory evidence on two different occasions was not sufficient, and that they must see whether there was such confirmatory evidence of the defendant's deposition before the magistrate as proved that the evidence given by the defendant at the Quarter Sessions was false. In the present case it was proved by three witnesses that the prisoner had made statements to them contradictory of what he swore at the hearing, and I own I can take no distinction between statements made by the defendant upon oath and statements made by him seriously and on several occasions not upon oath. Then, in addition to the statements of the defendant himself, there are strong confirmatory circumstances. The defendant offering to smash the case for one pound; his admitting that he had received ten shillings and was to have ten shillings more; and his talking of making the publican pay to settle it, are strong evidence to show that what he stated upon his oath was false, and that his statements not upon oath were true. For these reasons (for which I am responsible) I think the conviction was right, even assuming that *Rex v. Knill* could not now be safely acted upon, though that conviction was supported by the Queen's Bench as constituted in the time of Lord *Tenterden*, and was also supported, according to the authority of *Chambre J.*, by the Court of Queen's Bench in the time of Lord

1858.

 Hook's
Case.

(a) 8 Car. & P. 238.

1858. *Mansfield*. Probably no Judge would now direct a conviction upon such evidence as was deemed sufficient in *Rex v. Knill* without confirmatory circumstances; but in this case the conviction is supported by the confirmatory evidence of several witnesses, and it must be affirmed.

Hook's
Case.

WIGHTMAN J.—In order to convict a defendant of perjury it is necessary that there should be two witnesses, for this obvious reason, that if there is but one oath against another oath it is altogether in doubt which is true, and therefore two witnesses are required to contradict the oath on which perjury is assigned. But it is not necessary that there should be two independent witnesses to contradict the particular fact, if there be two pieces of evidence in direct contradiction. Here one piece of evidence is, that the defendant himself is proved to have made statements directly contrary to his statement upon oath; that alone would not do: but in addition to that you have the oaths of other witnesses which go to show that that which he stated when not upon oath was true, and therefore you have two pieces of evidence. I ought rather to put it that, instead of two witnesses being necessary to prove each fact, you must have the evidence of two persons giving evidence in contradiction to what has been sworn to by the defendant; as, one witness who could prove, as in this case, that on other occasions the defendant had stated that which was diametrically opposed to that which he has sworn, and the other witness to give evidence of that which is directly opposite. You have therefore two contradictions; you have the contradiction of the defendant himself as deposed to on oath by one witness, and you have the contradiction of another independent witness who speaks to the falsehood of the fact—you therefore have two independent contradictions on oath. It therefore seems to

me that there was sufficient evidence, and I am of opinion that the conviction is right.

1858.

 Hook's
Case.

WILLES J.—I am of the same opinion.

BRAMWELL B.—The question in the case is, whether any matter be sufficiently proved which, if proved, would be enough to convict the prisoner of perjury. Now the matter proved was his own statement over and over again, which if true showed that what he swore was false. Well, were those statements not upon oath true, or was his statement upon oath true? The answer to that is, there is abundant evidence by which you can tell, because there is plenty of evidence to induce you to give a preference to the unsworn statement over the sworn one. Well then the matter which, if true, though contradicted, is enough to convict, is sufficiently proved by other circumstances, and that is sufficient to support the conviction. As I said before, if there be two opposing oaths only you could not properly convict a man of perjury, because the only legitimate conclusion to be drawn is that one was false. But when the oath complained of is sufficiently established, and you have other evidence to show that the oath not complained of was true, then it follows that the oath complained of was a false one. Whether in the case of two contradictory oaths the truth of the oath not complained of would have to be proved by two witnesses, I do not undertake to say at the present moment. The case of *Rex v. Knill* goes to show that it would not. Here you have a witness to prove that the defendant stated that he had seen a man come out of the house, and that proves that which, if true, goes to show that the defendant was guilty of perjury. Then, that that *was* true is proved by other witnesses, so that the matter is not left in doubt. I think therefore the conviction was right.

BYLES J.—The rule of law requiring two witnesses

1858.

Hook's
Case.

to prove an assignment of perjury reposes on two reasons ; first, that it would often be dangerous and always unsatisfactory to convict the defendant when there is but the oath of one man against the oath of another : secondly, that in all judicial proceedings all witnesses, even the most honest, would be constantly exposed to the peril, annoyance and oppression of indictments for perjury if the single oath of another men, without any confirmatory evidence, might, in point of law, suffice to convict.

But the letter and spirit of the rule, and both the reasons for it, appear to me to be satisfied where, of two distinct admissions of the defendant inconsistent with his innocence, one is proved by one witness, and one by another.

It has been already held that the testimony of one witness deposing to the defendant's admission on oath, if there is corroboration, is enough ; *Regina v. Wheatland (a)*. But if a single witness deposing to an admission of the defendant be one witness within the rule, then another witness, deposing to another admission, must surely be a second witness within the same rule.

Indeed, where the reasons for the rule requiring two witnesses in perjury do not exist, the rule itself no longer holds ; and therefore the Court of Queen's Bench, in *Rex v. Knill*, have gone so far as to decide that, where the only evidence of the defendant's guilt is his own admission on oath (perjury being properly assigned in the indictment), the defendant may be convicted on the single testimony of one witness swearing to this contradictory deposition of the defendant himself.

For these reasons I think the conviction right.

Conviction affirmed.

AN

INDEX

TO THE

PRINCIPAL MATTERS.

ABORTION.

1. The prisoner was convicted on an indictment under section 6 of 7 *Wm. 4 & 1 Vict. c. 85.*, for administering and causing to be taken by *E. C.* certain poison with intent to procure her miscarriage. It appeared that *E. C.* being pregnant applied to the prisoner to get her something to procure miscarriage, and that the prisoner did procure a drug which drug was given by the prisoner to *E. C.*, and taken by her with intent to procure, and did in fact procure miscarriage; but that the taking by *E. C.* was not in the presence of the prisoner. *Held*, that the conviction was right, inasmuch as there was a "causing to be taken" within the meaning of the statute. *Regina v. Harriett Wilson*, 127
2. The prisoner was convicted on an indictment, under section 6 of 7 *Wm. 4 & 1 Vict. c. 85.*, containing several counts, for administering and causing to be taken by

L. C. certain noxious drugs, with intent to procure abortion. It appeared that the prisoner delivered certain drugs to *L. C.* in order that she might take them with a view to produce abortion, and told her where she could procure other drugs with the same view. That the last mentioned drugs were procured by *L. C.*, and afterwards made into pills by the prisoner, and that *L. C.* did, for the purpose aforesaid, take not only the drugs so delivered to her by the prisoner, but also the drugs so procured by *L. C.* and made into pills by the prisoner; and that enough of each was taken to be noxious; but it did not appear that the prisoner was present when any of the drugs were taken. *Held*, that the conviction was right, and that the case was not distinguishable from *Regina v. Harriett Wilson*, p. 127. *Regina v. Mary Ann Farrow*, 164

See MANSLAUGHTER (3).

ACCESSORY

Before the fact, see *Regina v. Gaylor*,
288

ACCOUNTABLE RECEIPT.

See FORGERY (2).

ADULTERER.

See LARCENY (3).

AFFILIATION ORDER.

The prisoner was convicted on an indictment for perjury on the hearing of an affiliation summons. The applicant for the summons had returned from service to the house of her parents to be confined; and, after remaining there for eight months, during which time she had no other home, she went to lodge at *D.* for the purpose of affiliating her child. *D.* was not in the same petty sessional division as the residence of her parents; but she went to *D.*, not fraudulently or for any improper reason, but from motives of convenience; and after lodging at *D.* for three weeks she applied for and obtained the summons in the petty sessional division in which *D.* was situate. She stated that she meant to leave *D.* immediately after the order, and she did leave the day after the order was made and went into service without returning to her parents. The jury found she had no other home than *D.*, and that she was residing there if in point of law she could, under the circumstances, be considered to be so. *Held*, that her residence was at *D.*, and therefore that, the magistrates of the petty sessional division in which *D.* was situate having jurisdiction, the conviction was right. *Regina v. Richard Hughes*,
188

AMENDMENT.

Under 14 & 15 *Vict.* c. 100., 113

ANATOMY ACT.

The defendant was convicted on an indictment charging him with disposing of certain dead bodies for the purpose of dissection. The defendant, the master of a workhouse, was a person having lawful possession of the bodies of deceased paupers: and under section 7 of the Anatomy Act (2 & 3 *Wm.* 4. c. 75.) it was lawful for him to permit such bodies to undergo anatomical examination, provided the relatives did not require them to be buried without such examination. For the purpose of preventing the relatives from making this requirement and leading them to suppose that the bodies were buried without dissection, the defendant showed the bodies to the relatives in coffins and caused the appearance of a funeral to be gone through. This fraud prevented the relatives from making the requirement, and the defendant, for gain to himself, disposed of the bodies for dissection. *Held*, that the statutory requirement not having in fact been made, the defendant was justified in what he did by the seventh section of the Anatomy Act, and that the conviction was wrong. *Regina v. Alfred Feist*,
590

ARREST OF JUDGMENT.

Sufficiency of averment after verdict on motion for arrest of judgment,
47

ARSON.

The prisoners were convicted on an indictment charging them with unlawfully and maliciously setting

fire to a stack of grain. The stack in question was of the flax-plant, with the seed or grain in it, and the jury found that the flax seed is a grain. *Held*, that the stack was a stack of grain within sect. 10 of 7 *Wm. 4* & 1 *Vict. c. 89. Regina v. John Spencer and Mary Davidson*, 131

ATTEMPT

To obtain money under false pretences. See FALSE PRETENCES (2).

To steal, 197

To murder, 303

AUTREFOIS ACQUIT.

Prisoner was indicted for stealing a pair of boots the property of *A.*, and acquitted. She was then indicted again for stealing the same boots laid as the property of *B.*, and pleaded *autrefois acquit*. It appeared that *A.* was a boy 14 years of age living with and assisting *B.*, who was his father; that the boots were the property of *B.*, but that, at the time they were stolen by the prisoner, *A.* had temporarily in his father's absence the charge of the stall from which they were stolen. *Held*, 1. That *A.* was not a bailee, and that the ownership of the boots could not properly be laid in him. 2. That the plea of *autrefois acquit* could not be sustained, notwithstanding the power of amendment given by 14 & 15 *Vict. c. 100. Regina v. Green*, 113

AWARD.

See PUBLIC ROAD.

BAILEE.

See AUTREFOIS ACQUIT.

LARCENY (4), (10).

BANK NOTES.

Notes of a provincial bank not in circulation for value, but in course of transmission from one branch bank to another, are properly described as money, 109

BANKRUPT.

1. A bankrupt upon an examination, under section 117 of the Bankrupt Law Consolidation Act (12 & 13 *Vict. c. 106.*), is bound to answer all questions touching matters relating to his trade dealings or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers may criminate himself; and (per Lord CAMPBELL C. J., ALDERSON B., WILLES J. and BRAMWELL B.; COLERIDGE J. *dissentiente*.) such answers may afterwards be given in evidence against him upon a criminal charge.

In an indictment against a bankrupt, under section 252 of the said statute, for mutilating his books; it was alleged that before and at the time, &c., to wit, on the 23rd November 1855, *B. S.* was a trader liable to become bankrupt within the meaning of the said Act, and that he, for more than six months next immediately preceding the time of filing the petition for adjudication, &c., did reside and carry on business as such trader within the jurisdiction, &c.; and that whilst he so resided, &c., to wit, on the 23rd November 1855, he filed with the registrar, &c., a declaration that he was unable to meet his engagements; and that whilst he so resided, &c., to wit, on the 23rd November 1855, he did present his petition for adjudication. *Held*, after verdict, that the averments in the indictment

were sufficient to shew that the requirement of the 17 & 18 *Vict.* c. 119. s. 16., as to filing the declaration of insolvency, had been complied with. *Regina v. Benjamin Scott*, 47

2. The compulsory examination of a bankrupt under section 117 of the Bankrupt Law Consolidation Act (12 & 13 *Vict.* c. 106.) is admissible in evidence against him on a criminal charge. *Regina v. John Cross and James Leyland*, 68

BIGAMY.

1. The prisoner was convicted on an indictment for bigamy. It appeared that her first husband had been continually absent from her for seven years next preceding the second marriage; on which occasion she represented herself as a single woman, and was married by her maiden name. The jury, being asked to consider whether she knew her husband to be alive at the time of the second marriage, and, if not, whether she had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge if she had chosen to make use of them. *Held*, that upon that finding the conviction could not be sustained.

Quere, whether the onus was cast on the prosecution of proving that the prisoner knew that her husband was alive, or on the prisoner of proving that she did not know it. *Regina v. Briggs*, 98

2. The prisoner was convicted on an indictment for bigamy. It was alleged that the first marriage took place in a Dissenter's chapel duly licenced for marriages, and a witness was called who proved that

he was present at the marriage; that it took place in the dissenter's chapel in the presence of the registrar; that the entry of the marriage in the registrar's book was signed by the witness as a witness to the marriage, and that the parties afterwards lived together as man and wife for some years. *Held*, 1. That the parol testimony of the witness sufficiently proved the fact of marriage. 2. That there was *prima facie* evidence that the chapel was duly registered, and was a place in which marriages might legally be solemnized.

A witness produced a certificate, under the hand of the superintendent registrar, of the fact that the chapel had been duly registered. It did not purport to be a copy or extract, but the witness proved that he had examined it with the register book at the office of the superintendent registrar, and that it was correct. *Held*, per POLLOCK C. B. and WILLES J., that the document was admissible as an examined copy or extract from the superintendent registrar's book, under section 14 of 14 & 15 *Vict.* c. 99., and was therefore good evidence of the due registration of the chapel. *Regina v. Henry Manwaring*, 132

BILL OF EXCEPTIONS.

See *Errata and Addenda*.

BODILY INJURY.

See MURDER.

CARDS.

In an indictment under section 17 of 8 & 9 *Vict.* c. 109., for winning money at cards by fraud, unlawful device and ill practice, it is not necessary to state to whom the money belonged.

Quere whether, in order to constitute an offence under the statute in question, it is necessary that any money should be actually obtained. *Regina v. William Moss*, 104

CASES AFFIRMED.

REGINA v. HOLLOWAY (1 Den. C. C. 370). *Regina v. Poole and Yeates*, 345

Regina v. FRY (*ante*, p. 449). *Regina v. West*, 575

CASES CONSIDERED AND OBSERVED UPON.

CATHERWOOD v. CASLON (13 Mee. & W. 261). *Regina v. Manwaring*, 139

REGINA v. ABBOTT (1 Den. C. C. 273). *Regina v. Burgon*, 11

Same case. *Regina v. Roebuck*, 24

Same case. *Regina v. Bryan*, 274

REGINA v. CODRINGTON (1 Car. & P. 661). *Regina v. Burgon*, 11

Same case. *Regina v. Roebuck*, 24

REGINA v. KENRICK (5 Q. B. Rep. 49). *Regina v. Burgon*, 11

Same case. *Regina v. Roebuck*, 24

Same case. *Regina v. Gardner*, 44

REGINA v. MILLIS (10 Cl. & F. 534). *Regina v. Manwaring*, 139

REGINA v. REED (7 Car. & P. 848). *Regina v. Roebuck*, 35

Same case. *Regina v. Sherwood*, 254, 256

REGINA v. ROEBUCK (*ante*, p. 24). *Regina v. Bryan*, 274

REX v. CARR (Russ. & Ry. 198). *Regina v. Walker*, 603

VOL. I.

Y Y

CASE OVERRULED.

REGINA v. REED (7 Car. & P. 848). *Regina v. Sherwood*, 251

CASE RESERVED.

How Court will deal with case when the direction given to the jury is not sufficiently shewn, 145

Costs upon, 326

CAVEAT EMPTOR.

See *REGINA v. BURGON*, 11.

CERTIORARI.

Removal of indictment by, 173 (n).

CHALLENGE.

See *JURY*.

CHAPEL.

Proof of registration of, 132

CHEAT AT COMMON LAW.

See *FORGERY* (4).

CHEQUE.

Allegation of property in, 426

CHRISTIAN NAME.

What is evidence of, 194

COERCION.

See *WIFE*.

CONSTABLE.

The defendant was convicted upon an indictment charging him with assaulting a constable in the execution of his duty. It appeared that the constable whilst standing outside the defendant's house saw

him take up a shovel and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open;" that in about twenty minutes afterwards the defendant left his house, after saying that he would leave his wife altogether, and was taken into custody by the constable, who had no warrant, when he had proceeded a short distance in the direction of his father's residence; and that upon being so taken into custody the defendant resisted and assaulted the constable. *Held*, that the constable was justified in apprehending the defendant, and that the conviction was right. *Regina v. George Light*, 332

CORPSE.

Removing corpse from burial ground, 160

Disposing of corpse for dissection.
See ANATOMY ACT.

COSTS.

The Judge who tries a prisoner has power, under section 22 of statute 7 Geo. 4. c. 64., to allow the costs of the prosecution on the hearing of a case reserved for the Court for consideration of Crown Cases; and the officer of that Court will tax and ascertain such costs, and certify the amount to the officer of the Court below. *Regina v. John Lewis*, 326

COUNTY COURT.

1. The prisoner was convicted, on an indictment under section 57 of 9 & 10 Vict. c. 95., for acting and professing to act under a false colour and pretence of the process of the County Court. It appeared that the prisoner, being a creditor

of *R.*, sent him a letter not in any way resembling County Court process, but headed with the royal arms and purporting to be signed by the clerk of a County Court, threatening County Court proceedings. He afterwards told the wife of *R.* that he had ordered the County Court to send the letter, upon which she paid the debt: and, whilst the prisoner was writing out a receipt, he demanded of her a sum of money for County Court expenses.

Held, by Lord CAMPBELL C. J., ERLE J., WILLIAMS J. and CROWDER J., that these facts constituted an acting and professing to act under the false colour or pretence of the process of the County Court within the meaning of the section; and that the conviction was right.

Held, by BRAMWELL B., that that portion of the section upon which the indictment was framed referred to false pretences whilst acting under genuine process, and that the conviction was wrong. *Regina v. John Evans*, 236

2. *A.* was convicted, on an indictment framed upon section 57 of 9 & 10 Vict. c. 95., of feloniously causing to be delivered to *T. C.* a certain paper falsely purporting to be a copy of a certain process of the County Court of *L.* The paper in question was headed "In the County Court of *L.* *A.* plaintiff and *T. C.* defendant," and was addressed to "*T. C.*, the above defendant," and gave him notice to produce, "on the trial of this cause," on a given day, certain accounts and papers; and at the foot of the paper were the words, "By the plaintiff." *Held*, that the conviction was wrong, inasmuch as the paper did not purport to be a copy of a summons to witnesses, under section 85 of 9 & 10

Vict. c. 95., or of any other process of the County Court. *Regina v. Witham Castle*, 363

DEAD BODY.

See CORPSE.

DEPOSITION.

Admissibility of in case of illness. See EVIDENCE (2).

DISSECTION.

Disposing of corpse for. See ANATOMY ACT.

DYING DECLARATION.

Upon a trial for manslaughter, it was proved that the deceased eleven days before his death, being then in such a state that it was impossible for him to recover, said to a constable, upon his asking him how he was, "the doctor has given me some little hope that I am better, but I do not myself think I shall ultimately recover." He then made a statement to the constable, concluding, "I have made this statement believing I shall not recover;" and before the constable left the room the deceased said that he could not recover. *Held*, that the statement was sufficiently proved to have been made under a sense of impending death, and that it was admissible in evidence as a dying declaration. *Regina v. William Reaney and James Reddish*, 151

EMBEZZLEMENT.

1. The prisoner was convicted of embezzlement. It was the prisoner's duty to receive remittances from the customers of his masters, to enter them to the credit of such customers in a day or cash book, and to enter the whole amount received by him on the

credit side of a banker's deposit account, and to pay in the amount to the credit of the prosecutors with their bankers; and it was his duty afterwards to post the amounts in a ledger which contained the accounts of the different customers. The prisoner received a remittance which he appropriated to his own use. He made an entry of this amount in the ledger to the credit of the customer, but he made no other entry of its receipt. *Held*, that the conviction was right as the entry made in the ledger did not exempt the prisoner from the operation of section 47 of 7 & 8 Geo. 4. c. 29. *Regina v. Charles Lister*, 118

2. A railway station was maintained at the joint cost of four companies whose lines met there, and was under the management of a committee of eight directors, two of whom were appointed by each company. This committee was called *The General Station Committee*, and appointed, dismissed, and paid out of a fund, contributed by the four companies, the cashier, the chief clerk, and other officers, clerks and servants employed at the station; and out of that fund any loss by embezzlement of servants was made good to the particular company by whom such loss was suffered. The prisoner was a delivery clerk so employed, and it was his duty to deliver parcels arriving at the station by the trains of any of the four companies, and receive the charge for carriage and delivery; and to account for and pay over the sums received to the chief clerk, who paid them to the cashier of *The General Station Committee* to the account of the several companies to whom the same respectively belonged; the cashier keeping a

separate account for each company, and paying over the money belonging to such company or to its bankers. The prisoner on delivering to the consignee a parcel brought by one of the said four companies appropriated part of the sum received for carriage and delivery, and accounted for the other part, which according to the usual course of business was paid to the bankers of the company. *Held*, that in an indictment for embezzling the sum so appropriated the prisoner might be properly charged either as the servant of the four companies or as the servant of the committee. *Regina v. Edward Bayley*, 121

3. The prisoner was convicted of embezzlement on an indictment which charged that he received the money for and in the name and on the account of his master. It appeared that the prisoner's master was agent for a railway Company, for delivering goods, and that he employed his own servants (of whom the prisoner was one), and used his own drays and horses, and was answerable to the Company for monies collected by his servants for carriage. It was the duty of the prisoner to go out with a dray, to take with him goods and a delivery book handed to him by a clerk of the Company, and to receive the amount of carriage therein specified as due to the Company, and then to account for the sums so received with the Company's clerk. The sums charged as embezzled were sums received by the prisoner for carriage and entered in the delivery book, and such sums were paid to the prisoner and received by him as due to the Company, and he gave receipts for the same in the name of the Company. *Held*, that the conviction was right as, although the prisoner received the money "in the

name" of the company, he received it "on account" of his master. *Regina v. Edward Thorpe*, 562

4. The prisoner was convicted of embezzlement. The prosecutors, who were manure manufacturers, engaged the prisoner, who kept a refreshment house at *B.*, to get orders, which they supplied from their stores. The prisoner was to collect the money and pay it at once to them and send a weekly account; and was called agent for the *B.* district. He was to go through the county, see the farmers and get orders, and to be continually during the season among the farmers. Subsequently the prosecutors sent large quantities of manure to stores at *B.* which were under the control of the prisoner, who took them in his own name and paid the rent to the owner, but was repaid such rent by the prosecutors when the accounts were adjusted. The prisoner supplied the manure from these stores; but it did not appear that the former mode of supply might not have been resorted to if found convenient. The prisoner signed a proposal to a guarantee society to insure the prosecutors, which stated his salary was 1*l.* per annum, besides commission which was estimated at 65*l.* per annum, and it was proved that the prosecutors had agreed to give the salary of 1*l.* per annum. Having appropriated money received from customers, the prisoner fraudulently returned their names as the names of persons who had not paid.

Held, that the conviction was wrong, as the evidence did not establish that the prisoner was servant to the prosecutors within the meaning of the statute. *Regina v. Samuel Walker*, 600

5. The prisoner, who was the clerk to a savings bank, was convicted on

an indictment charging him with embezzlement, the property being laid in *A. B.* In order to prove that *A. B.* was a trustee of the bank he was called as a witness, and stated that since the commission of the offence he had been acting as a trustee; but that before that date he had attended only one meeting, having on that occasion been requested to do so lest there should be a deficiency of trustees; but he was also a manager of the bank, and it did not appear that any act was done by him at that meeting which he might not have done as a manager. *Held*, that this was insufficient evidence of acting to support the inference of the legal appointment of *A. B.* as a trustee, and that the conviction was wrong. *Regina v. Samuel Essex*, 369

See LARCENY (2).

RECEIVING (3).

ERROR.

See JURY.

EVIDENCE.

1. The prisoners were convicted of felony. The only evidence of the Christian name of the prosecutor was the statement of a witness, who said that he had seen the prosecutor sign his name to the charge against the prisoners, and to his deposition before the committing magistrates. Both those documents were produced to the witness, but only so much of them was read as shewed that they were signed "*Thomas Bent*." The witness then said, that from the signatures to those documents he knew the prosecutor's name was *Thomas Bent*; but that, except from having seen him sign his name on those two occasions,

he had no knowledge of his Christian name. *Held*, that this was admissible and sufficient evidence of the Christian name of the prosecutor, and that the conviction was right. *Regina v. Frederick Toole and Others*, 194

2. It being proposed to give in evidence the deposition of a witness, his medical attendant was called, who said he might have been brought to the Court without danger to his life, though he, as his physician, would not permit him to roam abroad if he knew it; and that he was suffering from an attack of paralysis which disabled him altogether from giving evidence. Another person proved that he had seen the witness the day previously in the street near the door of his shop. *Held*, that on this evidence the deposition was rightly received. *Regina v. Cockburn*, 203

Evidence on indictment for night poaching,	1
Of other offences to show intent to defraud,	24
Of answers given on compulsory examination of a bankrupt, 47, 68	
Of marriage,	132
Of registration of chapel,	132
Of dying declaration,	151
As to necessity for disproving prisoner's statement where practicable,	157
Evidence of intestacy,	340

FALSE PRETENCES.

1. The prisoner was convicted on an indictment charging him with obtaining a cheque for 80*l.* by false pretences. The prisoner applied to the prosecutor (a solicitor) for the loan of 80*l.*, and falsely

represented that a house had been built by him on certain land, the lease of which he proposed to deposit with the prosecutor by way of security. The prisoner obtained from the prosecutor the loan of 80*l.* (for which amount the prosecutor gave him his cheque), on the deposit of the said lease, on signing an agreement to execute a mortgage, and on executing a bond. The land was within three miles of the residence of the prosecutor, who did not, before advancing the money, go to look at it. No house had in fact been built on the land in question, but the prisoner had built a house on another piece of land adjoining, which he had mortgaged to another person. *Held*, that the conviction was right. *Regina v. Burgon*, 11

2. The prisoner was indicted for obtaining money by false pretences. It appeared that the prisoner offered a chain in pledge to a pawnbroker, falsely and fraudulently stating that it was a silver chain, whereas in fact it was not silver; but was made of a composition worth about a farthing an ounce. The pawnbroker tested the chain, and finding that it withstood the test he, relying on his own examination and test of the chain, and not placing any reliance upon the prisoner's statement, lent the prisoner ten shillings, the sum he asked, and took the chain as a pledge. *Held*, that if the money had been obtained by the statement made by the prisoner, he might have been convicted of obtaining it by false pretences; but that as the prosecutor relied entirely upon his own examination, and not upon the false statement, the prisoner was properly found guilty of an attempt to commit that offence.

Upon the trial of the indict-

ment evidence was admitted to prove that the prisoner, a few days after the commission of the above offence, offered a similar chain in pledge to another pawnbroker; and that twenty-six similar chains were found upon the person of the prisoner when he was apprehended. *Held*, that the evidence was properly admitted. *Regina v. William Roebuck*, 24

3. The prisoner, by falsely pretending that he was a naval officer, induced the prosecutrix to enter into a contract with him to lodge and board him at a guinea a week, and under this contract he was lodged and supplied with various articles of food. *Held*, that a conviction for obtaining the articles of food by false pretences could not be sustained, as the obtaining of the food was too remotely the result of the false pretence. *Regina v. William Gardner*, 40
4. An indictment charged, that the defendant knowingly falsely pretended that a horse was sound, and that he himself was a farmer at *O.*, negating both pretences in the usual way. The defendant was convicted, but a case reserved, in which, after stating that the various allegations in the indictment were proved, and that the defence was that this was a case of giving a false warranty, and therefore not indictable, the question was put, whether the conviction could be sustained? The Court having directed an amendment of the case, the facts proved at the trial were set out more specifically, but it was not stated as a fact that the defendant knew the horse to be unsound, though evidence was stated, from which that inference might be drawn; nor was it stated what direction

the chairman had given to the jury.

Held, that, as the case was framed, the conviction must be quashed; as the Court, not knowing what direction had been given to the jury, could not answer the question put to it in the affirmative; and as it was consistent with the case that the jury might have been told that, even if the defendant did not know that the horse was unsound, he might be convicted upon the other false pretence alone. *Regina v. Keighley*, 145

5. The prisoner was convicted on an indictment for obtaining money by false pretences. The indictment alleged that the money was obtained by the prisoner by the false pretence that he had cut 63 fans of chaff when in fact he had only cut 45 fans. It appeared by the evidence that the prisoner was employed to cut chaff at two-pence per fan, and that on making the false pretence alleged in the indictment he demanded 10s. 6d. from the prosecutor. The prosecutor had previously seen the prisoner remove 18 fans from an adjoining place and add them to the heap which he pretended he had cut; but, notwithstanding this knowledge, he paid the prisoner the amount he demanded. *Held*, that the conviction was wrong, as the money was not obtained by means of the false pretence. *Regina v. William Mills*, 205

6. The prisoner was convicted on an indictment charging him with obtaining money by false pretences; the alleged pretences being as to the weight of coals sold and delivered by the prisoner to the prosecutrix. It appeared in evidence that the prisoner, having agreed with the prosecutrix to sell and

deliver a load of coal at a certain price per cwt., did deliver a load of coal which he knew weighed 14 cwt. only; but he falsely and fraudulently pretended that the weight was 18 cwt. and that it had been weighed out at the colliery, and he produced a ticket showing such to be the weight, which ticket he said he had made out himself when the coal was weighed; and the prosecutrix thereupon paid him for the 18 cwt. *Held*, that the conviction was right. *Regina v. Samuel Sherwood*, 251

7. The prisoner was convicted on an indictment for obtaining money by false pretences, the pretences charged being that certain spoons were of the best quality; that they were equal to *Elkington's A* (meaning spoons made by Messrs. *Elkington* and stamped by them with the letter A); that the foundation was of the best material, and that they had as much silver upon them as *Elkington's A*. The misrepresentations were made to certain pawnbrokers for the purpose of obtaining, and the prisoner did thereby obtain, advances of money on the spoons, which were in fact of inferior quality and not worth the sums advanced. The pawnbrokers stated that they were induced by the prisoner's misrepresentation, and by nothing else, to advance the money; and that if they had known the real quality of the spoons they would not have advanced money upon them. The jury found the prisoner guilty of fraudulently representing that the goods had as much silver on them as *Elkington's A*, and that the foundations were of the best material, knowing that to be untrue, and that he thereby obtained the money.

Held, by Lord CAMPBELL C. J.,

COCKBURN C. J., POLLOCK C. B.,
COLERIDGE J., CRESSWELL J.,
ERLE J., CROMPTON J., CROW-
DER J., WATSON B. and CHAN-
NELL B. (WILLES J. *dissentiente*
and BRAMWELL B. *dubitante*), that
the conviction was wrong. *Regina*
v. John Bryan, 265

8. The prisoner was convicted upon an indictment, founded upon section 53 of 7 & 8 Geo. 4. c. 29., for obtaining a valuable security by false pretences. The facts were, that the prisoner falsely represented to the prosecutor that a third person was baling up for him a quantity of leather which was to come into his warehouse that afternoon, and the prosecutor, relying on such false statement, at the request of the prisoner, agreed to purchase the leather and to accept a bill for the amount of the purchase money. The prisoner shortly afterwards produced and handed to the prosecutor a bill duly stamped, signed by himself as drawer, addressed to the prosecutor, and made payable to the prisoner's own order; and the prosecutor accepted the bill and returned it to the prisoner, who subsequently indorsed and negotiated it, and appropriated the proceeds to his own use. *Held*, that the conviction could not be supported, as the bill, whilst in the hands of the prosecutor, was of no value to him nor to anyone else unless to the prisoner; and *semble*, the prosecutor had no property in the bill as a security, or even in the paper on which it was written. *Regina v. John Danger*, 307

9. The prisoner, by false and fraudulent representations made to the prosecutor as to his business, customers and profits, induced the prosecutor to enter into a part-

nership with him and to advance 500*l.* as part of the capital of the concern; and the prosecutor, after such advance, recognized and acted upon such partnership. *Held*, that this was not an *obtaining* of money by false pretences within the meaning of the statute. *Regina v. Robert Watson*, 348

10. In an indictment for false pretences, it was alleged that the prisoner obtained "from A. a cheque for the sum of 1*l.* 14*s.* 6*d.* of the monies of B." *Held*, that this was a sufficient allegation that the cheque was the property of B. *Regina v. William Ansell Godfrey*, 426

11. The prisoner fraudulently pretended that a genuine 1*l.* Irish bank note was a 5*l.* note, and thereby obtained the full value of a 5*l.* note in change. *Held*, that he was properly convicted of obtaining money by false pretences, although the person to whom the note was passed could read, and the note upon the face of it afforded ample means of detecting the fraud. *Regina v. Adam Jessop*, 442

12. The prisoner was convicted on an indictment charging her with obtaining 10*s.* by false pretences; one of the false pretences alleged being that the prisoner kept a shop and that the prosecutrix might go and live with her at the said shop until she obtained a situation.

It was proved that the prisoner falsely told the prosecutrix that she kept a shop at N., and promised prosecutrix that she should go home with her until she got a situation, and that the prosecutrix lent the prisoner half a sovereign which she promised to repay when they got home; but that the prisoner left the prosecutrix as soon as she had got the money, and did

not return. The jury found that the prosecutrix parted with the money under the belief that the prisoner kept a shop at *N.*: and that she (the prosecutrix) should have the money when she went home with her. *Held*, that the indictment was good and was supported by the evidence, and that the conviction was right. *Regina v. Mary Ann Fry*, 449

13. A fraudulent misrepresentation of an existing matter of fact accompanied by an executory promise to do something at a future period, as that the prisoner *had* bought certain skins and *would sell* them to the prosecutor, is a false pretence within the statute, although it appears that the promise, as well as such misrepresentation of fact, induced the prosecutor to part with the money. *Regina v. Charles West*, 575

See LARCENY (7).

FOREIGNERS.

An *English* ship on the high seas is part of the territory of *England*, and a foreigner on board such ship is subject to our laws, and therefore, if he there does an act which is a criminal offence by the law of *England*, he is amenable to that law, and may, by virtue of section 21 of the 18 & 19 *Vict.* c. 91., be tried for the offence before any Court of justice in the Queen's dominions having cognizance of such crimes, if committed within its limits, within whose jurisdiction he may be brought; for when so brought he is, within the meaning of that section, "found" within such jurisdiction.

Neither the liability of a foreigner to punishment for an offence committed by him in an *English* ship on the high seas, nor

the jurisdiction of the Courts of this country to try him for such offence, is affected by the fact that he was illegally and by force taken on board the ship and there illegally detained at the time of the commission of the offence, unless the act charged was committed for the purpose of releasing himself from illegal duress; and, therefore, where a foreigner, who was arrested in a foreign town, and forced on board an *English* ship, while kept in custody in such ship on the high seas, killed the officer who arrested him out of *malice prepense* and not with a view to escape, it was held that, even assuming such arrest and detention to be illegal, he was guilty of murder, and was properly tried for such offence at the Central Criminal Court within whose jurisdiction he was brought. *Regina v. Lopez and Sattler*, 525

See MANSLAUGHTER, (1).

FORGERY.

1. The prisoner was convicted on an indictment at common law for forging and uttering a diploma of the College of Surgeons. The jury found that the prisoner forged the document with the general intent to induce the belief that it was genuine and that he was a member of the College; and that he showed it to certain persons with intent to induce such belief in them; but that he had no intent in forging or in uttering to commit any particular fraud or specific wrong to any individual. *Held*, 1. That the conviction was wrong. 2. That although since the statute 14 *Vict.* c. 100. s. 8., it is sufficient in an indictment for forgery to allege that the act was done with intent to defraud, without alleging the intent to defraud

any particular person, it is still essential to a conviction that such an intent should be proved.

Semble, that a diploma of the College of Surgeons is not a public document. *Regina v. Hodgson*, 3

2. A pawnbroker's ticket or duplicate given in the form prescribed by 39 & 40 *Geo. 3. c. 99. s. 6.*, is "an accountable receipt for goods" within section 10 of 11 *Geo. 4 & 1 Wm. 4. c. 66.* Proceedings having been taken before justices, under section 14 of 39 & 40 *Geo. 3. c. 99.*, to compel a pawnbroker to deliver certain goods which had been pledged with him, the money advanced with interest having been repaid, he produced and delivered to the justices, through the hand of his attorney, a forged ticket or duplicate, as the genuine ticket which he had given when the goods were pledged, and which he had received back when the money was repaid. *Held*, that this amounted to an uttering by the pawnbroker. *Regina v. William Fitchie*, 175

3. The prisoner was convicted upon an indictment which charged him in one count with uttering a warrant, and in another with uttering an order, for the payment of money. A dividend warrant of a railway company, signed by the secretary and addressed to a banker, required the latter to pay the amount named in the warrant to a certain shareholder or order, and to charge the same to the company's revenue account. It was stated on the warrant that the shareholder's name must be indorsed at the back, and it was proved that the banker would not pay the money even to the shareholder himself without such indorsement. The prisoner uttered this dividend warrant knowing

that the indorsement of the shareholder's name thereon was a forgery. *Held*, that the forgery of the signature of the shareholder was a forgery of the entire document; that such document was properly described as a warrant or order for the payment of money, and that the conviction was right. *Regina v. Edward Autey*, 294

4. A forgery must be of some document or writing; therefore the painting an artist's name in the corner of a picture in order to pass it off as an original picture by that artist is not a forgery.

Semble, That if a man in the course of his trade or business, openly carried on, puts a false mark or token upon a spurious article so as to pass it off as a genuine one, and the article is sold and money obtained by means of the false mark or token, he is guilty of a cheat at common law. *Regina v. Thomas Closs*, 460

5. The prisoner, who was convicted of forgery, was a railway station master, and it was his duty to pay *B.* for collecting and delivering parcels for the Company, who provided the prisoner with a form in which to enter, under the heads "Delivery" and "Collecting," the sums so paid by him. The prisoner having falsely told *B.* that the Company had determined to discontinue paying for the delivery of the parcels paid him for the collecting only, but in his accounts with the Company continued to charge them with payments purporting to be made to *B.* for delivery; and, in order to furnish a voucher, the prisoner continued to fill up the form as before, and, after paying the servant of *B.* the sum entered in the column for collecting, wrote the words "Received for *B.*," which *B.*'s servant

signed; and the prisoner afterwards placed a receipt stamp under such signature, and put on it a sum in figures equal to the sums inserted in the two columns for collecting and delivery. The jury found that the document thus added to meant differently to what it meant before. *Held*, that this was a forgery and that the conviction was right. *Regina v. Francis Griffiths*, 548

6. The false making of a letter of recommendation with intent fraudulently to obtain a situation as a police constable, is a forgery at common law (*BRAMWELL B. dubitante*). *Regina v. Moah*, 550

7. The master of a vessel having made and signed a report of a seaman's character upon his discharge, in the form sanctioned by the Board of Trade, the shipping master gave the seaman a copy of such report. The prisoner knowingly and fraudulently made a facsimile of this report; but, instead of writing the letter *M*., which stood in the original to indicate that the seaman's character for ability and conduct was middling, wrote *G*. indicating that it was good. *Held*, that the prisoner was guilty of an offence within section 176 of the 17 & 18 *Vict. c. 104*.

Quære, whether the act of the prisoner amounted to forgery at common law. *Regina v. James Wilson*, 558

8. The prisoner was convicted of forgery. It appeared that one *Borwick*, the prosecutor, sold powders called "*Borwick's Baking Powders*" and *Borwick's Egg Powders*," which powders he invariably sold in packets wrapped up in printed papers. The prisoner procured 10,000 wrappers to be

printed similar, with some exceptions, to *Borwick's* wrappers. In these wrappers the prisoner enclosed powders of his own which he sold for *Borwick's* powders; and it was for the forgery and uttering of these wrappers that the prisoner was indicted.

The jury found that the wrappers so far resembled *Borwick's* as to deceive persons of ordinary observation and to make them believe them to be *Borwick's*, and that they were procured and used by the prisoner with intent to defraud. *Held*, that the conviction was wrong. *Regina v. John Smith*, 566

FRAUD.

Winning money fraudulently at cards, 104

FRAUDULENT TRUSTEES ACT.

See LARCENY (10).

GAMING.

Winning money fraudulently at a game, 104

GUNPOWDER.

Storing gunpowder. See PUBLIC NUISANCE.

HIGH SEAS.

As to offences committed on the high seas,

See MANSLAUGHTER.

FOREIGNERS.

HOUSEBREAKING.

The prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods, specified in the indictment, the property of the prosecutor. At the time of the breaking and entering the goods specified were not in the house, but there were other goods there the property of the prosecutor. The jury acquitted the prisoner of the felony charged, but found him guilty of breaking and entering the dwelling-house of the prosecutor, and *attempting to steal his goods therein*. *Held*, that the conviction was wrong, as there was no attempt to commit the "felony charged" within the meaning of section 9 of 14 & 15 Vict. c. 100. *Regina v. Andrew M'Pherson*, 197

HUSBAND AND WIFE.

See WIFE.

INDICTMENT.

For cheating at cards,	104
Bank notes not in circulation, how described in,	109
Amendment of,	113
Removal of, by certiorari,	173

INTENT.

Intent to defraud in forgery,	3
Evidence of other offence to show intent to defraud,	24
Causing bodily injury with intent to murder,	303

INTESTACY.

Evidence of,	340
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JUDGMENT.

See ARREST OF JUDGMENT.

JURY.

1. The prisoner, who was convicted of murder, brought error on the judgment. The record set out an award of venire to the sheriff which required him to impanel and return a jury "of good and lawful men of the county," and then proceeded to state that the sheriff, for the purpose aforesaid, impanelled and returned certain persons and arrayed them in one panel; but the sheriff's return did not state that the persons so impanelled were good and lawful men of the county.

The panel contained fifty-four names. Eighteen, when called, were peremptorily challenged by the prisoner; one came not; fifteen were, on the prayer of the counsel for the Crown (the prisoner's counsel objecting and praying that cause of challenge should be shown), ordered to stand by; and nine were elected and tried to be sworn. There were only twelve other persons on the panel and they were at that time absent deliberating upon their verdict in another case. The name of *W. I.* (one of the persons so ordered to stand by and being the first who was so ordered on the prayer of the Crown) was then again called, and the counsel for the Crown again prayed that he might be ordered to stand by, upon which the counsel for the prisoner prayed that the cause of challenge should be shown forthwith. Thereupon, and before any judgment was given, the twelve persons who sat as a jury in the other case came into Court and gave their verdict; and the counsel for the Crown then prayed that *W. I.* should be ordered to stand by until such twelve persons should be called; but the counsel for the prisoner

demanding that *W. I.* should be sworn unless cause of challenge were shown. The Court ordered that *W. I.* should stand by; and three persons (being the number required to complete the jury) were taken from the said twelve jurors, and elected and tried to be sworn, although the prisoner's counsel objected that such persons ought to be called in their proper order with other persons in the panel, and that *J. J.*, the person whose name stood in the panel immediately after that of *W. I.*, ought to be next called.

J. P., one of the said three last mentioned jurors, then, without being sworn, said, that he had conscientious scruples against capital punishments; and thereupon the counsel for the Crown prayed that he should be ordered to stand by. The counsel for the prisoner prayed that the Crown should show cause of challenge. The Judge then told *J. P.*, that if he felt that he could not do his duty he had better withdraw; the said *J. P.* then withdrew himself, and thereupon it was ordered by the Court that he should stand by. Several others out of the said twelve jurors were then, on the prayer of the Crown, ordered to stand by; one was peremptorily challenged by the prisoner, and another was then elected and tried to be sworn in the place of the said *J. P.*, thus completing the jury of twelve by whom the prisoner was tried.

Held by the Court of Queen's Bench and affirmed by the Court of Exchequer Chamber: 1. That by reasonable intendment the record showed that the persons named in the panel were good and lawful men of the county.

2. That the statement in the record that the Court ordered jurymen to stand by meant that the

jurymen, being challenged by the Crown, the consideration of such challenge was postponed till it should be seen whether a full jury could be made without them; but that, if the expression that jurymen should stand by had no legal meaning, error could not be assigned upon it.

3. That notwithstanding the statute 33 *Edw. 1. st. 4.* (re-enacted by 6 *Geo. 4. c. 50. s. 29.*) the Crown need not show cause of challenge till the whole panel be gone through, and it appears there will not be a full jury without the persons challenged.

4. That the panel is not to be considered as gone through, so as to require the Crown to assign cause of challenge, until the panel is not only once called over but exhausted: that is until, according to the usual practice of the Court and what may reasonably be expected, the fact is ascertained that there are no more jurors in the panel whose attendance may be procured; and, therefore, that *W. I.* was properly ordered to stand by the second time, and the three persons then required to complete the jury were properly taken from the twelve persons who, having sat upon another case, came into Court before the formation of the jury was completed.

5. That it is not necessary that the names of the jurors should be called over in the order in which they stand on the panel, and that course may be departed from when convenience requires; that the order in which the names were called in this case was convenient, and did not become illegal from having been suggested by the counsel for the Crown.

6. That the Court (without attaching any weight to what the said *J. P.* had said) was bound, on the prayer of the counsel for the

Crown, to order him to stand by, as he was in fact challenged by the Crown without assigning cause, and the challenge was not too late.

Semble, by the Court of Queen's Bench and by the Court of Exchequer Chamber, that there may be cases in which it would be the duty of the Court, even where there is no challenge or objection, either by the Crown or the prisoner, to excuse a jurymen on the panel when he is called, or to order him to withdraw if he is palpably unfit to perform his duty, through physical or mental infirmity.

Held, by the Court of Exchequer Chamber, that where a person convicted of felony brings error from the Court of Queen's Bench to the Exchequer Chamber, the general rules for governing the proceedings in error in civil cases under the Reg. Gen. of H. T., 4 Wm. 4., and under the Common Law Procedure Act, do not apply; but the prisoner must be brought up to the Court of Exchequer Chamber and must there pray over of the record and assign errors by delivering them in writing to the officer of that Court and must be present during the argument and the delivery of the judgment; and that the Attorney General or the counsel representing him for the Crown may, immediately on the assignment of errors being so delivered, orally join in error.

Quere, by the Court of Exchequer Chamber, whether the objections taken were matter of error.

Mansell v. Regina in Error, 375

2. On a trial for murder the panel of petit jurors, returned by the sheriff, contained the names of *J. H. T.* and *W. T.* The name of *J. H. T.* was called from the panel

as one of the jury, and *J. H. T.*, as was supposed, went into the box, and was duly sworn as *J. H. T.* without challenge. The prisoner was convicted. The following day it was discovered that *W. T.* had by mistake answered to the name of *J. H. T.*, and that *W. T.* was really the person who served on the jury.

Held, by Lord CAMPBELL C. J., COCKBURN C. J., COLERIDGE J., MARTIN B. and WATSON B., that there had been a mistrial, and that the Court for the Consideration of Crown Cases Reserved had jurisdiction to set aside the verdict and judgment; and (*dubitante* COLERIDGE J. and MARTIN B.) that the Court ought to order a *venire de novo* to issue.

Held, by ERLE J., CROMPTON J., CROWDER J., WILLES J., CHANNELL B., and BYLES J., that there was no mistrial.

Held, by POLLOCK C. B., ERLE J., WILLIAMS J., CROMPTON J., CROWDER J., WILLES J. and CHANNELL B., that this was not a question of law arising on the trial over which the Court had jurisdiction.

Quere, whether the objection made would be matter of error.
Regina v. Aaron Mellor, 468

113 LARCENY.

1. The prisoner was convicted of stealing certain articles which were stolen from the prosecutor's house on November 2, and sold by the prisoner on the night of November 4 in a room in a public house in which there were about thirty persons. The prisoner told the constable that *C.* and *D.* brought the goods to his house and that *E.* would say so, and that being on the spree he (the prisoner) sold the goods and spent the money. *C.* was subsequently

- convicted of stealing articles taken from the prosecutor's house at the same time when the articles in question were stolen. Neither *C.*, *D.* nor *E.*, though real persons and known to the constable, were called on the part of the prosecution. *Held*, that the conviction was right. *Regina v. Joseph Wilson*, 157
2. The prisoner was indicted, as a servant, for stealing 300*l.* the property of his masters. There was ample evidence of embezzlement, but not of stealing. The jury found a general verdict of guilty. *Held*, that the conviction was wrong notwithstanding the 13th section of 14 & 15 *Vict. c.* 100. *Regina v. William Gorbett*, 166
 3. The prisoner was convicted on an indictment charging him with stealing certain articles the property of the prosecutor. It appeared that the prisoner, who lodged in the house of the prosecutor, agreed with his wife that they should go away and live together in adultery. The prisoner left the house and the wife of the prosecutor followed him, and they were overtaken on the road in company together, the prisoner carrying a band box containing the articles mentioned in the indictment, being in fact part of the wearing apparel of the prosecutor's wife. *Held*, that the conviction was wrong. *Regina v. Charles Fitch*, 187
 4. The prisoner was convicted of larceny from *T. J.* It appeared that *T. J.*, the owner of a watch, sent it, to be regulated, to *A.*, (the person from whom he had bought it), who had no authority to deliver it to any one except the owner. The prisoner fraudulently induced *A.* to believe that *T. J.* desired that the watch should be sent by post to the postmaster at *B.* in a letter; and, the watch having been so sent, the prisoner personated *T. J.* and induced the postmaster to deliver it to him as *T. J.* *Held*, that on the receipt of the watch by the postmaster the special property of *A.* ceased, and the general property of the owner becoming unincumbered drew to it the possession; that the postmaster, for the purpose of delivering the watch to the owner, was his servant, and the postmaster's possession being the possession of the true owner, that the prisoner was rightly convicted of larceny from *T. J.* *Regina v. William Kay*, 231
 5. The prisoner was charged with stealing a number of articles laid as the property of the Bishop of *Peterborough*, the county in which the things were stolen being in that diocese.
To prove the intestacy of the person to whom the property had belonged, and that the property was in the Ordinary, it was shown that a search for a will had been unsuccessfully made in the drawers and boxes of the deceased, and that no letters of administration had been taken out in the proper local Court.
As to some of the articles mentioned in the indictment, it was shown that they were in the possession of the deceased at the time of her death; but as to the majority of the articles there was no evidence to show whether they were taken before or after her death, except that many of them were, on the day of the funeral, taken by the prisoner to the house of a witness. The Court, on the trial of the prisoner, refused to confine the case to the things shown to have

been in the possession of the deceased at the time of her death; and left the whole case to the jury, who convicted the prisoner.

Held: 1. That there was sufficient evidence of the intestacy of the deceased, and that the property was in the Ordinary. 2. That the Court properly left the whole case to the jury; and that the conviction was right. *Regina v. Ellen Jane Johnson*, 340

6. The prisoners were convicted of stealing gloves the property of their master. The prisoners were in the prosecutor's employ as glove finishers, and the practice was to take the finished gloves into an upper room on the prosecutor's premises and lay them on a table in order that the workmen might be paid according to the number they had finished. The prisoners took a quantity of finished gloves out of a store-room on the same premises, and (without removing them from the premises of the prosecutor) laid them on the table in the said upper room with intent fraudulently to obtain payment for them as for so many gloves finished by them. *Held*, that the conviction was wrong. *Regina v. Holloway*, 1 Den. C. C. 370, approved. *Regina v. John Poole and John Yeates*, 345

7. The prisoner was convicted upon an indictment charging him with stealing a cheque. It was proved that the prisoner was clerk to a savings bank, and received the cheque from a manager of the bank upon a false representation that one of the depositors had given notice of withdrawal, and for the purpose of handing it over to the depositor. It was found that, according to the usual course of business, if a depositor could

not attend at a proper time to receive the cheque it was handed to the prisoner as the agent of the depositor. *Held*, that the case was one of false pretences and not larceny, and that the conviction was wrong. *Regina v. Samuel Essex*, 371

8. The prisoner was employed by a banking company to conduct a branch bank, and the whole of the duties of that branch bank were discharged by him alone. His salary not only included payment for his services, but also for providing an office in his own house (where he carried on another business) for the purposes of the bank. In this office was an iron safe, provided by the bank, into which it was the duty of the prisoner to put at night money which had been received by him during the day, and which had not been required for the purposes of the bank. The manager of the bank kept one key of this box and the prisoner another. The prisoner furnished weekly accounts of monies received and paid by him, showing the balance in his hands and of what notes, cash or securities that balance consisted. In *September* 1855 the prisoner's accounts were audited and his cash found correct; but, although for two years afterwards he furnished the usual weekly accounts, no examination was during that time made of the balances appearing from those accounts to be in his hands. In *September* 1857, the manager having appointed a time for examining the cash in the hands of the prisoner, he said he was about 3000*l.* short in his cash, and handed over to the manager 75*l.* 10*s.* which he said was all the cash he had left, and which sum he took from a drawer in the counter and not from the safe.

He afterwards, when before the magistrate on a charge of embezzling the 3000*l.*, said, "I admit that I have taken the amount of money which appears in my weekly return dated September 12, 1857, and entered as a deficiency of 3021*l.* 9*s.* 9*d.*" The Judge advised the jury to convict the prisoner of larceny, if they were satisfied that any part of the said sum of 3021*l.* 9*s.* 9*d.* had at any time during the two years been taken by the prisoner from money which, having been received from customers, had before such taking been placed in the said safe, and included in the said weekly accounts. The jury found the prisoner guilty of larceny as a clerk, in having stolen some money received from customers which before such stealing had been placed in the safe, and made the subject of a weekly account.

Held: 1, That there was evidence that the prisoner, as his duty was, placed in the safe money which had been previously received from customers; that he thereby determined his own exclusive possession of the money; and that by afterwards taking some of such money out of the safe, *animo furandi*, he was guilty of larceny.

2. That the finding that the prisoner stole "some money" was sufficiently certain, it not being necessary that they should find that any specific amount was stolen on any particular day. *Regina v. Thomas Wright*, 431

9. An indictment charged that the prisoner whilst servant of *A.* stole the money of *A.* It appeared that the prisoner was not the servant of *A.* but the servant of *B.*, and that the money which he stole was the money of *B.*, but in the possession of *A.* as the agent of *B.* *Held*, that the allegation in the

indictment as to the prisoner being servant might be rejected as surplusage, and the prisoner convicted of simple larceny, the money being properly alleged to belong to *A.*, who had a special property therein. *Regina v. George Michael Jennings*, 447

10. The prisoner was indicted for larceny under s. 4 of the Fraudulent Trustees Act, 20 & 21 *Vict.* c. 54., and, in a 2nd count, for larceny at common law. It appeared that the prosecutrix having deposited a box of plate with the prisoner for safe custody, he broke open the box and took the plate out and pawned it. The jury returned a verdict of guilty but recommended the prisoner to mercy, on the ground that they believed that he intended ultimately to return the plate to the prosecutrix:—*Held*, that, although, as decided in *Regina v. Holloway*, to constitute larceny there must be an intention permanently to deprive the owner of the property, the recommendation by the jury did not so qualify the verdict as to bring the case within the principle of that decision.

Semble, that if not a larceny of the plate at common law, it was not made so by section 4 of The Fraudulent Trustees Act. *Regina v. William Trebilcock*, 453

11. The prisoners were convicted upon an indictment, framed upon section 44 of 7 & 8 *Geo.* 4. c. 29. of stealing metal fixed in land in a place dedicated to public use. It was proved that they had stolen a copper sun-dial fixed on the top of a wooden post standing in a churchyard. *Held* (*BRAMWELL B. dissentiente*) that the conviction was right. *Regina v. John Jones and Henry Jones*, 555

MANSLAUGHTER.

1. The prisoner was convicted of manslaughter. The prisoner and the deceased were foreigners, and the latter died at *Liverpool* from injuries inflicted by the prisoner on board a foreign ship on the high seas. *Held*, that the offence was not cognizable by our law, and that the conviction was wrong. *Regina v. John Lewis*, 182

2. The prisoner was convicted of manslaughter. It appeared that the deceased was with others employed in walling the inside of a shaft in a colliery. It was the duty of the prisoner to place a stage on the mouth of the shaft, and the death of the deceased was the direct consequence of the negligent omission on the part of the prisoner to perform such duty. *Held*, that the conviction was right.

That which constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence. *Regina v. David Hughes*, 248

3. The prisoner was convicted of manslaughter. It appeared that the prisoner procured sulphate of potash and gave it to his wife intending her to take it for the purpose of procuring abortion; and that she, believing herself to be pregnant, although in reality she was not, took the sulphate of potash in the absence of the prisoner, and died from its effects. *Held*, that the conviction was right. *Regina v. William Gaylor*, 288

See DYING DECLARATION.

MARRIAGE.

How proved,

132

MAXIMS.

Nemo tenetur se ipsum accusare, 59
Omnia rite esse acta, 144

MERCHANT SHIPPING ACT.

Forgery of certificate under. See FORGERY (7). 7

MISCARRIAGE.

See ABORTION.

MISDEMEANOR.

1. It is a misdemeanor at common law to remove without lawful authority a corpse from a grave in a burying ground belonging to a congregation of Protestant dissenters; and it is no defence to such a charge that the motive of the person removing the body was pious and laudable. *Regina v. George Brereton Sharpe*, 160
2. The defendants were convicted on a count of an indictment which charged that they unlawfully, knowingly and wilfully did deposit in a warehouse belonging to them near to divers streets and highways and to divers dwelling-houses of her Majesty's subjects, divers large and excessive quantities of a dangerous ignitable and explosive fluid called wood naphtha, and did keep in the said warehouse and near to the said streets, highways and dwelling-houses, the said fluid in such large, excessive and dangerous quantities, whereby the Queen's subjects passing along the said streets and highways, and residing in the said dwelling-houses, were in great danger of their lives and property and were kept in great alarm and terror *ad commune nocuimentum*.

It appeared in evidence that naphtha is very inflammable and if inflamed water could not put out the fire, unless applied in enormous quantities, and that a fire arising and communicating with the quantity kept upon the defendants' premises could not be quenched, and would produce very disastrous consequences to the neighbourhood. It also appeared that it was the practice never to allow any candles, fire, or gas light to be in the warehouse, and that so long as that continued the naphtha would not produce danger.

Held, by LORD CAMPBELL C.J., COCKBURN C. J., COLERIDGE J., CRESSWELL J., ERLE J., CROMPTON J., CROWDER J., WILLES J., BRAMWELL B., WATSON B. and CHANNELL B.

1. That the said count disclosed an indictable offence.

2. That the above facts, taken together, fully justified the verdict of guilty.

3. That the jury were entitled to take into consideration the liability to ignition *ab extra*.

4. That it was a question for the jury, whether the keeping and depositing did create danger to life and property as alleged; and that, although the Judge would not have been justified in directing a verdict of guilty without taking the opinion of the jury upon it, he was fully justified in telling the jury, that if the depositing and keeping the naphtha, coupled with its liability to ignition *ab extra*, created danger to life and property to the degree alleged, they might find a verdict of guilty.

Evidence was given on the trial that the defendants also stored on the same premises large quantities of rectified spirits of wine, and that the operation of mixing the wood naphtha with the spirits of wine was carried on upon the premises.

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Held, by POLLOCK C. B. (not dissenting from the ruling of the rest of the Court in point of law), that the conviction was wrong, because the defendants were indicted merely for *depositing* an article in a warehouse, and were convicted upon evidence of a dangerous *use* of it by mixing it with another article. *Regina v. Isaac Solly Lister and Benjamin Biggs*, 209

MONEY.

A. and *B.* were convicted on an indictment charging *A.* with stealing ninety-five pounds *in money*, and *B.* with receiving five pounds *in money*, part of the said ninety-five pounds, knowing it to have been stolen. It appeared in evidence that *A.* stole certain notes of a provincial bank which were not then in circulation for value, but which were paid in at one branch of the bank, and were in course of transmission to another branch, at which they had been originally issued, in order that they might be there re-issued or otherwise disposed of, it not being the practice of the bank to re-issue at one branch notes originally issued at another; and it also appeared that *B.* received one of such notes knowing it to have been so stolen.

Held, that the conviction was right, the notes being "bank notes" within the meaning of section 18 of 14 & 15 *Vict.* c. 100., and therefore properly described as money in the indictment. *Regina v. Frederick West and Elizabeth West*, 109

See LARCENY (8).

MURDER.

The prisoner was convicted upon an indictment, framed on section 2 of 7 *Wm.* 4 & 1 *Vict.* c. 85., for causing a bodily injury dangerous

to life with intent to murder. It appeared that the prisoner, intending to cause the death of her infant child, exposed it in an open field on a cold wet day, and that it was found there after some hours nearly dead from congestion of the lungs and heart, which would shortly have proved fatal if relief had not been given; but by care it was restored in a few hours so that no bodily injury remained.

Held, that in order to sustain the indictment it was not enough to prove a mere temporary functional derangement, and that, there being no lesion of the organs of the child, the conviction was wrong. *Regina v. Harriet Gray*, 303

Murder by foreigner in English vessel on the high seas. See FOREIGNERS.

NAME.

What is evidence of, 194

NIGHT POACHING.

On an indictment for night poaching it is not necessary, on behalf of the prosecution, to show that no permission to be on the land was given by the landlord or tenant, in order to prove that the prisoners were there unlawfully. *Regina v. James Wood*, 1

NUISANCE.

See PUBLIC NUISANCE.

PERJURY.

The prisoner was convicted of perjury. The prisoner, who was a policeman, having laid an information against a publican for keeping open his house after lawful hours, swore on the hearing that he knew

nothing of the matter except what he had been told, and that "*he did not see any person leave the defendant's house after eleven*" on the night in question. The perjury was assigned on this last allegation; and the evidence to prove its falsehood was as follows: The magistrate's clerk proved that the prisoner, when laying the information, said that he had seen four men leave the house after eleven, and that he could swear to one as *W*. It was also proved that on two other occasions the prisoner made a similar statement to two other witnesses; that *W*. and others did in fact leave the house after eleven o'clock on the night in question; that on the hearing the prisoner acknowledged that he had offered to smash the case for 30s.; that he had talked, in the presence of another witness, of making the publican give him money to settle it; that he had, in fact, offered to the publican to settle it for 17.; and said that he had received 10s. to smash the case, and was to have 10s. more. *Held*, that the evidence was sufficient to prove the perjury assigned, and that the conviction was right. *Regina v. Hook*, 606

PLEA.

Autrefois acquit. See *Regina v. Green*, 113

POACHING.

See NIGHT POACHING.

POLICEMAN.

See CONSTABLE.

PRACTICE.

On the argument of a case before the Court for the consideration of

Crown Cases reserved, the counsel for the defendant must begin. *Regina v. Gate Fulford*, 74

As to practice in error in criminal cases in the Court of Exchequer Chamber. See *Mansell v. Regina in error*, 375

PROPERTY.

What is sufficient allegation of, 426

PUBLIC DOCUMENT.

Semble, that a diploma of the College of Surgeons is not a public document, 3

Quere, whether a certificate of Holy Orders is a document of a public nature, 9

PUBLIC NUISANCE.

Storing large quantities of ignitable and explosive matter near dwelling houses is indictable, 209

PUBLIC ROAD.

Gate Fulford and *Water Fulford* were townships in the parish of *Fulford Ambo*; and the whole of *Gate Fulford* and part of *Water Fulford* constituted the manor of *Fulford*. The township of *Gate Fulford* was indicted for non-repair of a road; and the indictment charged the liability as resulting from an Inclosure Act and an award.

The Inclosure Act directed that commissioners by award should divide and allot certain lands in the manor of *Fulford*, which (it was contended) were shown by the context to be all in the township of *Gate Fulford*, and should set out the public and private roads in the lands to be divided and allotted; and that the public

roads so set out should be repaired by the township of *Gate Fulford*.

The award set out some roads which it termed public highways and roads, some which it termed public carriage roads, and others which it termed private carriage roads. It then set out the road in question, which it termed a "carriage road" simply, and directed that it should be repaired by the inhabitants of "the township of *Fulford* aforesaid," without specifying which township was meant. Another road, also termed simply a "carriage road," appeared to be set out as a private road. The jury found a verdict for the Crown subject to the opinion of this Court.

Held that, as against the township, it sufficiently appeared, from the award, that the road in question was made a public road.

The road in question ran through what was now understood to be the township of *Water Fulford*. Evidence was given that the township of *Gate Fulford* had, on various occasions, repaired the road, but had also repaired roads in the township which were not public roads.

Held that, assuming it to be true (as was contended) that the commissioners had power to award only as to lands in *Gate Fulford*, the Court would presume that the lands on which the road was constructed lay, at the time of making the award, in *Gate Fulford*, the evidence being that from which a jury, if they had been asked the question, might have inferred this.

Agreed that, if it had appeared that the road so set out had, as to any part, been on land over which the power of the commissioners did not extend, the award would have been bad as to the whole road. *Regina v. Gate Fulford*, 74

RECEIVING.

1. The prisoner was tried in *Wiltshire*, and convicted upon an indictment charging him with receiving the half of a bank note, knowing it to have been stolen. The only evidence of any receipt or possession by the prisoner, in *Wiltshire*, was that the half note, which had been stolen during its transit through the post-office from *S.*, in *Wiltshire*, to *Bristol*, was afterwards inclosed by the prisoner in a letter, posted by him in *Somersetshire*, and addressed to the bankers at *S.*, requesting payment of it; and that that letter arrived with its contents in due course at *S.* *Held*, that as the possession of the post-office servants or of the bankers in *Wiltshire* was the possession of the prisoner, he was properly tried in *Wiltshire*, and the conviction was right. *Regina v. George Cryer*, 324

2. The two prisoners, husband and wife, were jointly indicted for receiving goods knowing them to have been stolen. The jury found both the prisoners guilty, and that the wife received the goods without the controul or knowledge of and apart from her husband, and that he afterwards adopted his wife's receipt. *Held* that, upon this finding, the conviction of the husband could not be sustained.

Query, whether sect. 14 of 14 & 15 *Vict.* c. 100. applies to successive receipts of the same goods by different receivers. *Regina v. William Dring and Mary his Wife*, 329

3. The prisoner was found guilty of receiving goods knowing them to have been stolen. The prisoner was tried with *B.* and *C.*, who were charged in different

counts with embezzling and stealing goods the property of their master; and the prisoner was charged in the same indictment with receiving the same goods knowing them to have been stolen. The jury found *B.* guilty on the count for embezzlement only and acquitted *C.*, finding the prisoner guilty on the count for receiving. *Held*, that the conviction of the prisoner was right. *Regina v. Thomas Frampton*, 585

RESIDENCE.

See AFFILIATION ORDER.

TRUSTEE.

Evidence of acting as,	369
Fraudulent Trustees Act,	453

UTTERING.

See FORGERY, 1, 2.

VALUABLE SECURITY.

See FALSE PRETENCES, 8.

WOOD NAPTHA.

Storing in large quantities near dwelling-houses indictable, 209

WIFE.

A wife was convicted, jointly with her husband, upon an indictment, one count of which charged a felonious wounding with intent to disfigure; and another count alleged the intent to be to do grievous bodily harm.

The jury found that the wife acted under the coercion of her husband, and that she herself did not personally inflict any violence upon the prosecutor. *Held*, that the conviction of the wife was wrong. *Regina v. Samuel Smith and Sarah Smith*, 553

